SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1386

ADAM CLAYTON POWELL, JR., et al.,

Plaintiffs-Petitioners,

against

JOHN W. McCORMACK, et al.,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI PRIOR TO JUDGMENT IN THE COURT OF APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Supreme Court of the United States

October Term, 1966

No.

ADAM CLAYTON POWELL, JR., et al.,

Plaintiffs-Petitioners,

against

JOHN W. McCORMACK, et al.,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI PRIOR TO JUDGMENT IN THE COURT OF APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari prior to judgment in the Court of Appeals for the District of Columbia issue to review the order and judgment of the United States District Court for the District of Columbia denying petitioners' application for the certification of the necessity of a statutory three- judge court, dismissing petitioners' complaint for want of jurisdiction of the subject matter, and denying petitioners' motion for a preliminary injunction, which order and judgment are now pending on appeal in the United States Court of Appeals for the District of Columbia Circuit, and/or to review the order of the said Court of Appeals denying the petitioners' motion for summary reversal thereof.

Opinions Below

The District Court, Hart, U.S.D.J., denying an application for certification of the necessity of a statutory three-judge court, dismissed the complaint for want of jurisdiction of the subject matter and denied a motion for preliminary injunction. Its opinion is not yet reported and appears as Appendix A. The Court of Appeals denied a motion for summary reversal of the order and judgment of the District Court. Its orders appear as Appendices B and C. The May 10th order of the Court of Appeals appears as Appendix D.

Jurisdiction

The order and judgment of the District Court was entered on April 7, 1967. The orders of the Court of Appeals were entered on April 27, 1967 and May 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

HOUSE RESOLUTION 278
IN THE HOUSE OF REPRESENTATIVES
approved March 1, 1967.
RESOLUTION

WHEREAS,

The Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of of New York in legal proceedings pending therein to which

he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governer of the State of New York of the existing vacancy.

Questions Presented

1. Whether the unconstitutional exclusion from membership in the 90th Congress of Congressman-Elect Powell, the fully constitutionally qualified and duly elected Representative of the 18th Congressional District of New York

and the resulting disfranchisement of over 300,000 citizens of that District raises issues "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court" pursuant to Rule 20 of this Court?

2. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House, and further to bar him from membership for the entire 90th Session violates the Constitution of the United States, and in particular Article One, Clause Two, and Article One, Clause Five, thereof.

3. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House violates the fundamental and inalienable rights of the class of Petitioners, citizens of the 18th Congressional District of New York to the free choice of their own representatives to the Legislature essential to a system of representative democracy?

4. Whether the legislative punishment inflicted upon the Petitioner by the enactment of House Resolution 278 violated the Constitutional prohibition against Bills of Attainder?

5. Whether the punishment by exclusion of the Petitioner from membership in the House violated the Due Process guarantee of the Fifth Amendment to the Constitution of the United States.

6. Whether the exclusion of the Petitioner violated his rights and the rights of the class of Petitioners representing the overwhelming Negro majority of the citizens of the 18th Congressional District of New York guaranteed to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States?

7. Whether the dismissal of the complaint for "want of jurisdiction over the subject matter" was erroneous and in violation of Article III of the Constitution of the United States?

8. Whether the questions presented in the complaint are justiciable and subject to review by the national courts?

9. Whether the courts have power to grant the relief required to remedy the violations of Petitioners' rights?

10. Whether the District Court erred in refusing to certify the necessity for a three-judge statutory district court and, if so, whether this Court should order the convening of such a court and instruct such court to grant forthwith the relief prayed for herein?

Statement of the Case

The bedrock constitutional questions raised in this Petition, invoking this Court's special powers to grant a petition for writ of certiorari prior to judgment in the Court of Appeals pursuant to Rule 20 of the Rules of this Court, arise out of the extraordinary, arbitrary, and unconstitutional action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York, possessing all requisite constitutional qualifications for membership in that body, and, further permanently barring him from membership in the entire 90th Session of the House. Because many of the relevant facts relating thereto have been of necessity incorporated in the legal arguments hereinafter set forth, Petitioners will here confine themselves to a recital of the basic uncontested facts leading up to the House's extraordinary unconstitutional action which has resulted in a crisis decisive to the future of representative democracy in this country.

Statement of Facts

1. The facts preceding the institution of the present action

Petitioner Adam Clayton Powell, Jr., the duly nominated Democratic candidate for the House of Representatives for the 18th Congressional District of New York, received the greatest number of votes cast for that office at the general election of November 8, 1966. The official tabulation of said votes, as certified by the Secretary of State of the State of New York, was as follows:

Lassen L. Walsh (Rep)	10,711
Adam C. Powell (Dem)	45,308
Richard Prideaux (Lib)	3,954
Rylan E. D. Chase (Con)	1,214

Based upon said tabulation, a certificate of election was issued by the Secretary of State on December 15, 1966, and duly forwarded to and received by the Clerk of the House of Representatives.

The 90th Congress opened on January 10, 1967, after respondent McCormack had been elected as the Speaker of the House of Representatives and duly sworn pursuant to the provisions of Title 2, U.S. Code, Section 25. He informed the House that he would, pursuant to the said Section 25, administer the oath to the Members-elect thereof. Prior to said administration, however, Representative Van Deerlin, of California, asked that Congressman Powell stand aside during the administration of said oath, which request, because of its status as a point of the highest personal privilege, was granted by the Speaker. After the other Members-elect has been sworn, a resolution, hereinafter referred to as House Resolution 1, was introduced and passed. House Resolution 1 reads as follows:

> *Resolved,* That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Con-

gress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee or any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

The committee shall report to the House within five weeks after the members of the committee are appointed the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Subsequently, and on January 19, 1967, the Speaker, pursuant to the provisions of the aforesaid resolution,

appointed five Democrats and four Republicans, all lawyers, to serve as members of said select committee under the chairmanship of the Honorable Emanuel Celler, the Chairman of the House Judiciary Committee. On February 1, 1967, Mr. Celler, at the direction of the Select Committee, invited Member-Elect Powell to appear before it "to give testimony and to respond to interrogation" concerning his age, citizenship and inhabitancy and certain other matters.*

The attorneys for Petitioner Powell filed several motions and supporting memoranda before, during, and after hearings held by the Select Committee on February 8, 14

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* The chairman's letter was as follows:

Hon. ADAM CLAYTON POWELL
U. S. House of Representatives,
Washington, D. C.

Dear Mr. Powell: I enclose a copy of House Resolution 1, 90th Congress, pursuant to which the Speaker on January 19, 1967, after consultation with the Minority Leader, appointed the following Members to carry on the inquiry contemplated therein:

Honorable Emanuel Celler, Chairman; Honorable James C. Corman; Honorable Claude Pepper; Honorable John Conyers, Jr.; Honorable Andrew Jacobs, Jr.; Honorable Arch A. Moore, Jr.; Honorable Charles M. Teague; Honorable Clark MacGregor; Honorable Vernon W. Thompson.

The Committee has directed me to invite you to appear before it on Wednesday, February 8, 1967, at 10:30 A.M., in Room 2141, Rayburn House Office Building, Washington, D. C., to give testimony and to respond to interrogation concerning your qualifications of age, citizenship and inhabitancy, and the followng other matters:

(1) The status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court;

(2) Matters of your alleged official misconduct since January 3, 1961. You are advised that you may be accompanied by counsel and that the hearings will be conducted in accordance with paragraph 26, rule XI of the Rules of the House of Representatives.

Sincerely yours,

EMANUEL CELLER,
Chairman.

(Exhibit 1B to Petitioners' Motion for Summary Reversal below)

and 16, 1967, all raising the issue of the denial to him of both substantive and procedural due process by the Committee's proceeding to consider the matter of seating or expelling him with the minimum due process requirements of an adversary hearing.*

These motions and memoranda objected to: 1) the absence of any guides or standard by which alleged misconduct would be measured; 2) the absence of any charges and specification of violation of ascertainable proscribed conduct; 3) the absence of any of the procedural safeguards of an adversary hearing—such as a statement of charges, the right of confrontation, the right of cross-examination and the right of counsel in an adversary proceeding.

The total effect of these deprivations of due process was to deny to the individual and class plaintiffs fundamentally protected constitutional rights without any of the traditional safeguards of an adversary proceeding, although the resulting recommendations included, for example, one that "Adam Clayton Powell, *as punishment,* pay the Clerk of the House to be disposed of by him according to law, $40,000 (emphasis added).†

Petitioner Powell accompanied by counsel appeared before the Select Committee on February 8, 1967, and, after certain preliminaries ‡ which were made part of the record,** the Committee received a brief and heard argu-

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* (See Exhibit 1B, to Petitioners' Motion for Summary Reversal below, pp. 6-14, 31-49, 53-54, 111-113, 255-266.)

† (Exhibit 1C to Petitioners' Motion for Summary Reversal below, p. 34.)

‡ These included "official notice of the published hearings and reports of the Special Subcommittee on Contracts of the Committee on House Administration of the U. S. House of Representatives, 89th Congress, Second Session, relating to expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell)."

** (Exhibit 1C to Petitioners' Motion for Summary Reversal below, p. 2.)

ment by counsel for him on the principal substantive motion submitted; received, but refused to entertain argument on his procedural motions, and took all of the motions —which the Chairman initially characterized as "dilatory" †—under advisement. The Chairman, over the protest of Petitioner Powell's counsel as well as one member of the Committee, then insisted that he, Powell, take the oath and be interrogated by counsel for the Committee. The interrogation began and was interrupted shortly thereafter by the objection of Petitioner Powell's attorneys and their insistence that he would not proceed further without a ruling upon his pending motions. Thereupon, the Committee recessed and, upon reconvening, the Chairman denied all of the motions.‡

Petitioner Powell, under protest thereupon proceeded to be interrogated by counsel for the Committee but limited his testimony, upon the advice of counsel, to the con-

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† He later withdrew this categorization.

‡ With specific reference to Motion No. 5,which read as follows: Member-Elect Adam Clayton Powell, Jr., moves that he be afforded all the rights and protections guaranteed by the United States Constitution and the rules and precedents to a Member-Elect whose right to a seat in the House of Representatives is contested, including, but not limited to the following:

(1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser;

(2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is taken and to participate therein with full rights of cross-examination;

(3) the right to an open and public hearing;

stitutionally prescribed qualifications of age, citizenship and inhabitancy. Counsel for Petitioner Powell then submitted and the Committee received documentary evidence as to those issues. The Chairman thereupon refused to permit Mr. Powell, as previously promised to make a statement at that time.

Petitioner Powell, under the circumstances, did not again appear personally before the Committee. However, the Committee, under date of February 10, 1967, informed

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(4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;

(5) the right to a transcript of every hearing.

The Chairman, after denying same, stated:

"This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-Elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-Elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-Elect. Prior to this hearing the committee decided that it would allow the Member-Elect the right to an open and public hearing, and the right to a transcript of every hearing at which testimony is adduced. The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the member-Elect or his counsel. The Member-Elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings. In all other respects, the motion is denied. Again the committee states that this is an inquiry and not an adversary proceeding."

him that it would appreciate receiving certain information from him or his counsel.*

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* The Committee's letter to Petitioner Powell read as follows:

"Dear Mr. Powell: We wish to advise you that Select Committee, pursuant to House Resolution 1, 90th Congress, will hold a public hearing on Tuesday, February 14, 1967, at 10:00 o'clock a.m. in Room 2141, Rayburn House Office Building, Washington, D.C.

You and your counsel of record are invited to be present at the hearing. During the hearing on February 8, 1967, you are advised that upon the written request of you or your counsel, Select Committee will summon any witnesses having substantial relevant testimony to the inquiry being conducted by the Committee. I remind you of this and suggest that if you or your counsel desire to take advantage of the privilege afforded, please contact Mr. William A. Geoghegan, chief counsel of the Committee, and inform him of the names of the persons you would like summoned as witnesses and the nature of the testimony to be offered.

First and second motions made during the hearing on February 8 by your counsel Arthur Kinoy, Esquire, indicated you took the position Select Committee lacks authority to inquire into matters other than whether you have a right to take the oath and be seated as a member of the 90th Congress. And that, in making such determination, Select Committee is limited to inquiry to whether you met the qualifications for membership in the House, specifically, enumerated in Article I, Section 2, of the Constitution. These motions were denied.

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has

On February 14, 1967, counsel for Mr. Powell appeared before the Committee and responded fully to its request for information.*

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authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.

The public hearing scheduled for next Tuesday, February 14, 1967, the Select Committee would appreciate receiving from you or your counsel answer to the following questions:

One: With reference to the seating phase of our inquiry, do you refuse to give any testimony concerning (a) status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

Two: With reference to the second phase of our inquiry, relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2 of the Constitution, do you refuse to give any testimony concerning (a) status of legal proceedings in which you are a party of the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

At the public hearing scheduled for next Tuesday, February 14, 1967, you are again invited to give testimony and response to interrogation concerning the matters referred to in a letter dated February 6, 1967, from Mr. William A. Davis, chief counsel of the Select Committee, to your counsel, Mrs. Jean Camper Cahn, a copy of which is enclosed.

At the conclusion of your testimony next Tuesday, or, if you decline to testify, at the conclusion of the hearing, you will be given the opportunity to make a statement relevant to the subject matter of the Select Committee's inquiry. Unless additional matters come to our attention in the interim, the Select Committee has decided to conclude hearings on Tuesday, February 14, 1967.

EMANUEL CELLER, Chairman.

* The response of petitioner's counsel was as follows:

"The Member-Elect has received a letter dated February 10, 1967, from the Chairman of this Committee. That letter advises that this Committee had deferred decision on the question raised

by Congressman Powell and his counsel "as to whether the qualifications for membership in the House specifically enumerated in Article I, Section 2 of the Constitution (age, citizenship, and inhabitancy) should be deemed exclusive." We appreciate clarification of the Committee's action on this question.

The Committee further advises that it regards it mandate not only to inquire into Congressman Powell's qualifications for membership in the House of Representatives, "but additionally and simultaneously to inquire into whether" punishment or expulsion should be recommended to the House pursuant to powers granted under Article I, Section 5, Clause 2 of the Constitution. The provision reads:

> "Each House may determine the rules of its proceedings, punish its members for disorderly behavior and with the concurrence of two-thirds expel a member."

In short, this Committee conceives its function and scope as broad enough for it to determine Congressman Powell's right to take the oath as a member of the 90th Congress, and to determine simultaneously whether he has engaged in conduct warranting punishment by the House or expulsion therefrom, all in the same proceeding.

In connection with what this Committee conceives to be the proper scope of its inquiry the Committee invited Congressman Powell or his counsel to answer at this hearing the following questions:

1. As to what is described as the "'seating phase" of the Committee's inquiry whether Congressman Powell refuses to give any testimony concerning:

   (a) the status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court; and

   (b) alleged official misconduct on your part occurring at any time since January 3, 1961.

2. As to what is described as "the second phase" of the Committee's inquiry "relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2, of the Constitution," whether Congressman Powell refuses to give any testimony as to matters set out in (a) and (b) above.

It is our position and contention that this Committee in seeking to resolve the legal and constitutional questions raised as to the appropriate scope of its inquiry has compounded the legal and constitutional defects initially asserted in this inquiry.

The short of our position is that H.R. No. 1 authorizes inquiry solely and exclusively into Congressman Powell's qualifications for membership in the House. If we are in error in that regard, then we take the flat position that the House could not, pursuant to H.R. No. 1, or indeed pursuant to any resolution, authorize any Committee to make the kind of simultaneous inquiry which this Committee proposes to undertake. Before the power to punish a 'member', pursuant to Article I, Section 5, Clause 2 of the Constitution can be invoked, the determination of membership must have been concluded on the basis of qualifications for membership as set forth in Article I, Section 2, Clause 2 of the Constitution.

In summary, the reasons for our position are as follows:

1. Article I, Section 2, Clause 2 of the Constitution sets forth the sole and exclusive qualification for membership in the House of Representatives.

2. Article I, Section 5, Clause 2 of the Constitution deals expressly and exclusively with the power of the House to discipline its members—those persons who have been sworn and seated as members and for appropriate reasons are subject to punishment or expulsion. The meaning of the words is plain and unambiguous and the precedents and practice of the House compel the stated conclusion.

3. We concede, as we must, that the House has the power to proceed under each of these provisions. We reject, however, the Committee's assertion that the House, or any of its committees, can merge in one proceeding the power authorized by the two constitutional provisions. The precedent of the House supports this view. One of the basic reasons for the House's having consistently taken this position is because the merger of the two functions has been recognized as a method to expand unlawfully and dangerously the qualifications for membership in the House beyond the three stated in the Constitution.

4. Proceedings under Article I, Section 2, Clause 2, and proceedings under Article I, Section 5, Clause 2 involve two disparate functions which cannot be accomplished simultaneously. When the House proceeds under Article I, Section 2, Clause 2 to determine whether a member-elect possesses the requisite constitutional qualifications of age, citizenship, and inhabitancy, it is exercising an investigatory function. It is merely determining what the facts are in this regard. When the House proceeds under Article I, Section 5, Clause 2, however, its action is in the nature of a judicial function. It is making a judicial determination as the trier of the

facts as to whether a member charged with some form of misbehavior is guilty and should be punished even to the extent of expulsion. The Constitution itself requires that such process must take place within the framework of the minimal protections of the due process of law, including the specification of charges, right of confrontation, right to counsel, and the right to be heard. While we believe and have asserted that some of the basic requirements of due process must be adhered to in respect to proceedings under Article I, Section 2, Clause 2, since no punishment is involved, the standards are clearly not as strict as they must be in respect to Article I, Section 5, Clause 2.

5. Article I, Section 5 does not accord to the House a general judicial function. The function it has as a judicial body is limited solely and exclusively for the purpose of preventing obstructions to the House in the exercise of its legislative powers. Accordingly, the precedents uniformly hold that the "disorderly behavior" referred to in Article I, Section 5, Clause 2 relates solely to misconduct committed against the current House.

Accordingly, as to the "seating phase" of the Committee's inquiry, it is our position, as indicated by our motions, brief and oral argument heretofore that the scope and extent of the Committee's inquiry is limited to the three qualifications set out in Article I, Section 2. Therefore, we submit that the only and exclusive issues pertinent to Congressman Powell's right to a seat in the 90th Congress are whether he is 25 years of age, a United States citizen for seven years, and an inhabitant of New York. As to any issues beyond that, we are of the opinion that these are outside the jurisdiction of this Committee, and we have so advised the Member-Elect.

As to the "second phase" of the Committee's inquiry as delineated in the letter of February 10, it is our contention that neither the Committee nor the Congress can pursue an inquiry into its power to punish or expel a member without having first settled the threshold question of the Congressman's right to a seat.

Accordingly, we are of the opinion that any question except those relevant to the constitutional qualifications of Member-Elect Powell are outside the jurisdiction of the Committee, and we have so advised the Member-Elect.

Moreover, it is our considered opinion that this Select Committee cannot legally and constitutionally pursue these two objectives simultaneously.

We request the opportunity to submit a brief developing these responses prior to the close of these hearings.

Thereafter, the Committee held hearings and received evidence, culminating in its Report.

The following Findings, Conclusions and Recommendations appeared in the Committee's Report: *

FINDINGS

*1. Mr. Powell is over 25 years of age, has been a citizen of the United States of America for over 7 years, and on November 8, 1966, was an inhabitant of New York State.

2. Mr. Powell has repeatedly asserted a privilege and immunity from the processes of the courts of the State of New York not authorized by the Constitution. Mr. Powell has been held in criminal contempt by an order of the New York State Supreme Court, a court of original jurisdiction, entered on November 17, 1966. This order is now on appeal to the Appellate Division, first department, an intermediate appellate court in the State of New York, and is not a final order. At the time of the Committee's hearings, there were also outstanding three court orders holding Mr. Powell in civil contempt which were issued May 8, 1964, October 14, 1966, and December 14, 1966. The order of May 8, 1964, was vacated when the final judgment against Mr. Powell was satisfied on February 17, 1967.

3. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated $28,505.34 of public funds for his own use from July 31, 1965, to January 1, 1967, by allowing salary to be drawn on behalf of Y. Marjorie Flores as a clerk-hire employee when, in fact, she was his wife and not an employee in that she performed no official duties and further was not present in the State of New York or in Mr. Powell's Washington office, as required by Public Law 89-90, 89th Congress.

4. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated $15,683.27 of public funds to his own use from August 31, 1964, to July 31, 1965, by allowing salary to be drawn on behalf of said Y. Marjorie Flores as a clerk-hire employee when any official duties performed by her were not performed in the State of New York or Washington, D. C., in violation of House Resolution 294 of the 88th Congress and House Resolution 7 of the 89th Congress.

5. As chairman of the Committee on Education and Labor, Mr. Powell wrongfully and willfully appropriated $214.79 of public funds to his own use by allowing Sylvia Givens to be placed on the

staff of the House Education and Labor Committee in order that she do domestic work in Bimini, the Bahama Islands, from August 7 to August 20, 1966; and in that he failed to repay travel charged to the committee for Miss Givens from Miami to Washington, D. C.

6. As chairman of the Committee on Education and Labor, Mr. Powell on March 28, 1965, wrongfully and willfully appropriated $72 of public funds by ordering that a House Education and Labor Committee air travel card be used to purchase air transportation for his own son (Adam Clayton Powell III), for a member of his congressional office clerk-hire staff (Lillian Upshur), and for personal friends (Pearl Swangin and Jack Duncan), none of whom had any connection with official committee business.

7. As chairman of the Committee on Education and Labor, Mr. Powell willfully misappropriated $461.16 of public funds by giving to Emma T. Swann, a staff receptionist, airline tickets purchased with a committee credit card for three vacation trips to Miami, Fla., and return to Washington, D. C.

8. During his chairmanship of the Committee on Education and Labor, in the 89th Congress, Mr. Powell falsely certified for payment from public funds, vouchers totaling $1,291.92 covering transportation for other members of the committee staff between Washington, D. C., or New York City and Miami, Fla., when, in fact, the chairman (Mr. Powell) and a female member of the staff had incurred such travel expenses as a part of their private travel to Bimini, the Bahamas.

9. As chairman of the Committee on Education and Labor, Mr. Powell made false reports on expenditures of foreign exchange currency to the Committee on House Administration.

Conclusions and Recommendations

On the basis of the factual record before it, this Select Committee concludes that Member-Elect Adam Clayton Powell meets the qualifications of age, citizenship, and inhabitancy and holds a certificate of election from the State of New York. This Committee concludes, however, that the following conduct and behavior of Adam Clayton Powell has reflected adversely on the integrity and reputation of the House and its Members:

First, Adam Clayton Powell has repeatedly ignored processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the New York courts has caused him on several occasions

to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Second, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C., or New York, as required by law.

Third, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of House funds for private purposes.

Fourth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member.

Simultaneously with the filing of this report and the hearings in connection therewith, the Select Committee is forwarding copies of its hearings, records, and report to the Department of Justice for prompt and appropriate action, with the request that the House be kept advised in the matter.

This Committee recommends that—

1. Adam Clayton Powell be permitted to take the oath and be seated as a Member of the House of Representatives.

2. Adam Clayton Powell by reason of his gross misconduct be censured and condemned by the House of Representatives.

3. Adam Clayton Powell, as punishment, pay the Clerk of the House, to be disposed of by him according to law, $40,000; that the Sergeant-at-Arms of the House be directed to deduct $1,000 per month from the salary otherwise due Mr. Powell and pay the same to the Clerk, said deductions to continue until said sum of $40,000 is fully paid; and that said sums received by the Clerk shall offset any civil liability of Mr. Powell to the United States of America with respect to the matters referred to in paragraphs Second and Third above.

4. The seniority of Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. The House direct the Clerk of the House of Representatives to forthwith terminate salary payments to Corrine Huff whose name

appears on the clerk-hire payroll of Representative Adam Clayton Powell.

6. The House make a study in depth to determine whether or not existing procedural and substantive rules are adequate in cases involving charges of breach of public trust which have been lodged against any Member.

7. The Committee on House Administration, which currently is undertaking a revision of its auditing procedures, be directed by the House to file annually a report of audit of expenditures by each committee of the House and the clerk-hire payroll of each Member.

* * * *

. . . We recommend the adoption of the following resolution:

Whereas the Select Committee appointed pursuant to House Resolution 1 (90th Cong.) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship, and inhabitancy for membership in the House of Representatives and holds a certificate of election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct toward the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C., or the State of New York as required by law.

Fourth, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of Government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member:

Now, therefore be it resolved,

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-Elect from the 18th District of the State of New York.

On March 1, 1967, the House of Representatives, upon presentation to it of the said Committee Report, including the recommended resolution, rejected the resolution as proposed by the Committee and instead adopted House Resolution 278.*

2. The initiation of the complaint

The present action, which was brought by Congressman Powell and thirteen of his constituents, as class representa-

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2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, $40,000. The Sergeant-at-Arms of the House is directed to deduct $1,000 per month from the salary otherwise due to said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said $40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution.

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

(Exhibit 1C to Petitioners' Motion for Summary Reversal below)

* "RESOLVED, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York be, and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy."

tive of the electors of the 18th Congressional District, was instituted by the filing and service of a complaint seeking declaratory and injunctive relief and relief in the nature of mandamus, on March 8, 1967. The defendants named therein are the Speaker of the House of Representatives, five other members thereof, and the Clerk, the Sergeant-at-Arms and the Doorkeepers. The Member-defendants are sued individually and as representative of the class of Members, while the non-Member defendants are sued individually and in their respective capacities as agents or employees of the House of Representatives.

The complaint alleged that House Resolution 278 violated Article I, Section 2, Clause 2 of the Constitution of the United States in that it prescribed qualifications for membership in the House of Representatives other than those established therein. The complaint further alleged that the enactment of House Resolution 278, as to all non-white electors of the 18th Congressional District of New York, violated the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint further alleged that as to the female electors of the 18th Congressional District of New York, the enactment of House Resolution 278 violated the Nineteenth Amendment to the Constitution of the United States.

The complaint further alleged that insofar as Member-Elect Powell is concerned, House Resolution 278 constitutes a bill of attainder and an *ex post facto* law, in violation of Article I, Section 9 of the Constitution and inflicts cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States. Finally, the complaint further alleged that the hearings before the select committee, as well as House Resolution 278 and the debate thereon, denied Congressman Powell his fundamental rights of due process of law, in viola-

tion of the Fifth and Sixth Amendments to the Constitution of the United States.

B. Proceedings below

1) *Proceedings in the District Court*

After the filing and service of the complaint upon respondents, an application for the certification of the necessity of convening a three-judge court pursuant to 28 U.S.C. 2282 and 2284, and a motion for a preliminary injunction came on before the United States District Court for the District of Columbia on April 4, 1967. In addition to opposing Petitioners' application for the certification of the necessity of convening a three-judge court and their motion for interim injunctive relief, respondents moved to dismiss the action for lack of jurisdiction generally on the grounds that:

> (a) the District Court did not have jurisdiction over the subject matter of the action;
>
> (b) the District Court did not have jurisdiction over the persons of the respondents; and
>
> (c) the complaint failed to state a cause of action upon which relief could be granted.

On April 7, 1967, the District Court issued an order (i) denying the application for the certification of the necessity of three-judge court; (ii) dismissed the complaint for want of jurisdiction over the subject matter, and (iii) denying the motion for a preliminary injunction. In so doing the Court bottomed its decision on what it considered the doctrine of separation of powers. As it stated:

> "It is the conclusion of this Court that for the Court to decide this case on the merits and to grant any of the relief prayed for in the complaint would constitute a clear violation of the doctrine of sep-

aration of powers. For this Court to order any Member of the House of Representatives of the United States, any officer of the House, or any employee of the House to do or not to do an act related to the organization or membership of that House, would be for the Court to crash through a political thicket into political quicksand.

"This Court holds, therefore, that by reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter."

At the same time the District Court entered its order denying the application for a statutory three-judge court and for preliminary injunction and granting the motion to dismiss the complaint for want of jurisdiction of the subject matter. A notice of appeal from the aforesaid order was duly and immediately filed, on April 7, 1967.

2) *Proceedings in the United States Court of Appeals for the District of Columbia Circuit*

On April 9, 1967, Petitioners moved in the Court of Appeals for a summary reversal of the order and judgment of the District Court, a dispensation of the requirement for the filing of briefs and an immediate hearing thereon. On April 10, 1967, the Court of Appeals denied that portion of the motion seeking an immediate hearing thereon.

Subsequently, and on April 27, 1967, Petitioners' motion for summary reversal of the order and judgment of the District Court came before the Court of Appeals, Bazelon, Chief Judge, and Burger and Leventhal, Circuit Judges. Later that day, the Court of Appeals entered an order denying Petitioners' motions for summary reversal and to dispense with the filing of briefs, ordered that the appeal be heard on the original record on appeal in lieu of the filing of a printed joint appendix, directed counsel to establish a mutually agreeable briefing schedule by con-

ferring with the Clerk of the Court, and directed the Clerk "to schedule this case for argument on a day as soon after the briefs are filed as the business of the Court will permit."

On May 4, 1967, Petitioners, cognizant that they could not obtain review in this Court before well into the October, 1967, Term by any other procedure than that established by Rule 20 of the Revised Rules of this Court, informed the Court of Appeals that they intended to file an application for a writ of certiorari pursuant thereto. At the same time, Petitioners moved the Court of Appeals to defer any further consideration of their appeal pending the decision of this Court on their application for a writ of certiorari pending judgment below. Thereafter, and on May 5, 1967, Petitioners filed and served a designation of the entire record in the Court of Appeals. On May 10, 1967, the Court of Appeals recognizing "that novel issues of substantial public importance were tendered which . . . should be resolved at an early date"* entered an order providing that the time for filing of briefs in that court be extended pending disposition of this Petition by this Court, that the order of the Court of Appeals would be stayed if this Petition is granted, that except as stated in the order, the appellants' motion to stay proceedings was denied without prejudice to the filing of any motion to advance argument if the briefs are filed in the Court of Appeals, and that either party may seek further relief by appropriate motion for good and sufficient cause shown.

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* This order appears as Appendix D.

REASONS FOR GRANTING THE WRIT

I. The Constitutional Issues Advanced by the Petitioners in this Case are Serious and Substantial and Require in the Interests of the Nation Immediate and Authoritative Affirmation by this Court.

1. The action of the majority of the House of Representatives in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat and further barring him from membership in the House for the entire 90th Congress violates the Constitution of the United States.

Preliminary Statement

There are certain cases in the history of this Court which shape the very fabric of our society, which touch the "bedrock of our political system" (*Reynolds* v. *Sims,* 377 U.S. 533 (1964), which "strike at the heart of representative government" (*Harmon* v. *Forsennius,* 380 U.S. 528) and which due to the "peculiar delicacy" of the case (*Marbury* v. *Madison,* 1 Cranch 137), invoke that ultimate role of this Court which occasioned only recently words which give strength and security to a free people—that where "a denial of constitutionally protected rights demands judicial protection, our oath and our office require no less of us" (*Reynolds* v. *Sims, supra,* at p. 565, opinion of the Chief Justice). This petition once again brings such a case before the Court.

On March 1st of this year the House of Representatives, by formal vote, concluded that Congressman-Elect Adam Clayton Powell had been duly elected by the constituents of the 18th Congressional District of the State of New York, held a proper Certificate of Election from that State, and "possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives. House Res. 278, March 1st, 1967, Par. One. Nevertheless, in an unprecedented and extraordinary action, the House, overriding the urging of its own Select Committee, the Majority and Minority leaders of both political parties, and the Chairman of its own Judiciary Committee, refused to permit the Speaker to swear in Congressman-Elect Powell as the representative of the citizens of the district which had overwhelmingly elected him as their representative and ordered that he "be and the same hereby is excluded from membership in the 90th Congress." H. Res. 278 [1]

This action of the House majority in refusing to seat the chosen representative of the citizens of the 18th Congressional District although he concededly meets all constitutional qualifications for membership in the House and further barring him from representing his constituents for the entire 90th Congress is in open violation of the Constitution of the United States. It disregards the clear teachings of this Court from *Newberry* v. *United States*, 256 U.S. 232 (1920), to *Bond* v. *Floyd*, — U.S. —, 87 S. Ct. 339 (1966), in this Term of Court. It brushes aside countless reasoned and thoughtful precedents and rulings of its own body. But most serious of all, it challenges the fundamental precepts of representative democracy upon which this experiment in human government was founded and upon which its ultimate safety depends.

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[1] See Statement of Fact, *supra*, at p. 6.

A. The House of Representatives is required under the Constitution to seat a duly elected Congressman who meets all the qualifications for membership in the House set forth in the Constitution. *

(i) *It was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.*

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House were debated and accepted,[2] and all other qualifications whatsoever were rejected, reveals the unmistakable intention of the Enactors that neither branch of the Legislature was to have any power to alter, add to, vary or ignore the constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",[3] was, in the intention of the Framers, restricted solely to these qualifications set forth in the Constitution itself.

The legislative history of both of these critical clauses during the Philadelphia convention makes this crystal clear. As Professor Charles Warren describes the proceedings in his authoritative study of the Constitutional Convention, *The Making of our Constitution,* (1928), the intention of the Founding Fathers that the Legislature was to have no

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* Counsel wish to express their appreciation to Harriet Van Tassel, a member of the New York Bar, for her intensive research work on the materials included in this section.

[2] Article I, § 2, Clause 2 reads:

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

[3] Article I, Section 5, reads in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

power to alter, add to or ignore the Constitutional qualifications for membership in either House could not have been clearer.

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention*, p. 248, *et seq.*, the Convention turned to a proposal of Gouveneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250.[4] The effect of this proposal,

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[4] Gouveneur Morris' proposal arose out of a discussion which had great significance to the members of the Convention. After voting upon the age and residence qualifications the Convention was confronted with a proposal that an additional qualification of landed property be affixed to members of the Legislature. On June 26th, George Mason had suggested "the propriety of annexing to the office of Senator a qualification of property" Elliot's Debates, Vol. 5, p. 247. On July 26th, Mason further moved that "the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property . . . in members of the legislature . . ." Farrand, Vol. 2, p. 121. John Dickinson, of Delaware, strongly opposed such a clause stating that he "doubted the policy of interweaving into a Republican Constitution a veneration for wealth . . ." Farrand, Vol. 2, p. 123. On August 6, the Committee of Detail reported a provision that "The Legislature of the United States shall have authority to establish such uniform qualification of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Farrand, Vol. 2, p. 179. At this point Charles Pinckney moved that the President and Judges also be required to possess "competent property to make them independent." Farrand, Vol. 2, p. 248). Benjamin Franklin strongly opposed this proposal stating that he "expressed his dislike of everything that tended to debase the spirit of the common people." Farrand, Vol. 2, p. 249. Pinkney's motion was "rejected by so general a *no* that the States were not called". Farrand, Vol. 2, p. 249. At this point Morris moved to give Congress unlimited power to fix qualifications. Farrand, Vol. 2, p. 250. This motion was defeated and following this the Convention rejected the clause as reported by the Committee. Farrand, Vol. 2, p. 251. For a more extensive discussion of the debates and parliamentary moves see Warren, *The Making of the Constitution*, pp. 412 to 426.

Professor Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." *Warren*, at p. 420.

A debate, sweeping in its consequences for the establishment of the fundamental principles of representative democracy in this country, then developed. Mr. Williamson, of North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

> "This could surely never be admitted. Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body." 2 Farrand, *Records of the Federal Convention*, p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as its deemed expedient, would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:[5]

> "Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may

[5] Farrand, Vol. 2, p. 250.

be devised, by the stronger in order to keep out partisans of [a weaker] faction."

* * *

"Mr. (Madison) observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention.[6] They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."

The conclusion which flows from this legislative history is inescapable for as Professor Warren points out:

"The Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four—." Warren, p. 421, Farrand, Vol. 2, p. 250

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250. And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that: "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254.

As Professor Warren points out, "the meaning of this provision (which became Article I, § 5 of the Constitution, as finally drafted) is clearly shown" if taken in connection

[6] As Professor Warren points out, Madison's reference "was undoubtedly to the famous election case of John Wilkes in England," Warren, *supra*, at p. 420, who had been excluded as a member by the House of Commons on three occasions in 1769. We discuss, *infra*, at pp. 9 *et seq.* the extraordinary significance of the Wilkes case in respect to an understanding of the reasons underlying the insistence of the Founders that no power may safely be vested in the legislature to alter in any way the constitutional qualifications for membership in the legislature.

with the legislative actions and debates of August 10th which surrounded its enactment. Warren, *supra,* at p. 420. As Professor Warren summarizes this conclusion:

> "Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, *viz.*, age, citizenship and residence.[7] For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply. . . . The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself

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[7] Professor Warren further documents his conclusions by noting the interchange between Dickinson, of Delaware, and the Committee of Detail. As Professor Warren comments:

> "It is to be noted especially that Dickinson of Delaware, on July 26, expressed his opposition to 'any recital of qualifications in the Constitution' at all on this very ground; for, said he, 'it was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omission.' The Committee of Detail had differed from Dickinson's view and had made express provision as to qualifications. As to this express provision, Dickinson's argument was undoubtedly applicable that the recital of these qualifications did 'by implication tie up the hands of the Legislature from supplying' any further qualifications." Warren, *supra,* at pp. 421, 422.

as the sole source of qualifications." Warren, *supra*, at p. 421 [8]

(ii). *The "taproots" of this decision in Philadelphia are to be found in the contemporaneous struggles for the rights of the electorate in the British Parliament.*

This conclusion of the Constitutional Convention that the Legislature has no power to refuse to seat a duly elected member who meets all the constitutional qualifications was no dry, technical consideration on the part of the Founders, but reflected a deep concern that the vesting of any power in the Legislature to modify or alter the strict constitutional qualifications for membership in either House would be "improper and dangerous" to the first principles of representative democracy. Madison, Farrand, Vol. 2, p. 249.

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[8] The clear intention of the Enactors to restrict Congressional power to "judge" the "qualifications" of its members to the constitutionally enumerated qualifications is evidenced throughout the Convention proceedings. For example, Prof. Warren points out:

> "It is, moreover, especially to be noted that the provision that 'each House shall be the judge of . . . the qualifications of its own members' did not originate with this Convention. Such a provision was found in the State Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina. It was taken originally from William Penn's charter to Pennsylvania of 1701, which provided that the Assembly 'shall have power to choose a Speaker and their other officers, and shall be judges of the qualifications and elections of their own members.' Each of the State Constitutions contained provisions establishing many qualifications for members of the Legislature—residence, age, religion, property and others (qualifications expressed in both affirmative and negative terms); and it was with reference to possession of such qualifications that their Legislatures were authorized to judge as to their members. *There is, so far as appears, no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution.*" [Emphasis added] Warren, *supra*, at pp. 423-4.

As Mr. Madison warned, any deviation from this strict concept would "subvert the Constitution", Farrand, Vol. 2, p. 249. To permit a Legislature to control in any way the qualifications of elected representatives of the people was the path by which "a Republic may be converted into an aristocracy or oligarchy" Farrand, Vol. 2, p. 249.

This powerful conviction of the Founders that "the qualifications of elected representatives of the people were fundamental articles in a Republican Government and ought to be fixed by the Constitution", [remarks of Mr. Madison, Farrand, Vol. 2, p. 249] reflected a determination on the part of the Enactors to guarantee that recent activities of the British Parliament "subversive of the rights of"[9] the British people never be tolerated in this country. Thus Mr. Madison "observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or religious parties" Farrand, Vol. 2, p. 250.

As Professor Warren points out, "Madison's reference was undoubtedly to the famous election case of John Wilkes, in England, who had been rejected three times as a member by the House of Commons" Warren, *supra*, p. 470. Perhaps in no other case is the admonition of Mr. Justice Holmes so appropriate that a "page of history is worth a volume of logic". *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349. In the deepest sense of the word the issues and principles which underlay the contemporaneous struggles in England of John Wilkes against a "legislative tyranny" which "infringed more and more upon the fundamental rights of the electorate of England", Wittke, *The History of English Parliamentary Privilege* (Ohio State

[9] See Parliamentary Debates, 22 George III, 1411, discussed, *infra*, at pp. 18 *et seq.*

Univ. 1921)[10] was the "lesson" Mr. Madison referred to which had seared deeply into the American consciousness and was at the heart of the insistence of the Framers of the Constitution that the Legislature must have no power to restrict the free choice of the representatives of the people beyond those qualifications established by the people themselves in the fundamental law of the land.

In 1757 John Wilkes had been elected member of Parliament for Aylesbury. On April 23, 1763, he issued the famous Number 45 of the *North Briton* attacking the government over the peace treaty with France, charging that bribery was used to secure pliant cooperation with the Commons. A general warrant was issued for his arrest, and although he was freed by the Court of Common Pleas on the grounds of parliamentary immunity, he was brought to trial before King's Bench on charges of sedition and obscenity. Prior to the trial he was expelled, on January 20, 1764, from the House of Commons by a large majority on the grounds of his publication of Number 45.[11]

Rather than stand trial, Wilkes fled to France and the court adjudicated him in contempt and passed a sentence of outlawry. In 1768 Wilkes returned to England announcing his candidacy for Member from Middlesex County. At the March 28 elections he was overwhelmingly elected over two opponents. Following an extraordinary public demonstration in London in his support, culminating in the famous Massacre of St. George's Fields, the charge of outlawry was dismissed, but he was sentenced to twelve months in prison on the original seditious libel charge. On February 3, 1769, the House of Commons voted to exclude him from

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[10] See the discussion of the significance of the struggles of John Wilkes upon the emergence of fundamental freedoms in *Watkins v. United States,* 354 U.S. 178, at pp. 190, 191.

[11] Postgate, "That Devil Wilkes" (New York 1929), pp. 11, 51-53, 82.

the House on the grounds of "incapacity of John Wilkes, Esq. to be elected a Member to serve in said parliament." [12] He was promptly returned, unopposed, by his constituency on February 16, 1769. On February 17, 1769, the Commons excluded Wilkes a second time declaring once again his "incapacity" to sit as a Member. On March 16, 1769, Wilkes was again elected by his constituents by a vote of 1,143 over one Henry Luttrell, who had received 296 votes. On March 17, 1769, the House for the third time excluded Wilkes, this time declaring Luttrell the elected Member.[13]

Wilkes was released from prison in 1770, became Lord Mayor of London and resumed his seat in the House in 1774. From 1774 until 1780, in every session of Parliament he introduced and conducted bitter struggles to expunge from the records of the House the three prior resolutions of exclusion, culminating in his ultimate victory in 1782. In the course of these struggles the concepts which Wilkes insisted upon, the fundamental right of the electorate to choose their own representatives free from the control of the legislature and subject only to qualifications set by established law, became a burning issue in the American Revolution. As one of the most eminent historians of British and American relations at the time of the Revolution recently wrote:

> "The cry of 'Wilkes and Liberty' echoed loudly across the Atlantic ocean as wide publicity was given to every step of Wilkes' public career in the colonial press. . . . The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honor. Finally, colonial ceremonies commem-

[12] Postgate, *supra*, p. 88.

[13] Postgate, *supra*, p. 146, *et seq.*

orating the repeal of the Stamp Act held by the Sons of Liberty in Boston, New York, and elsewhere during the period 1768-1770, repeatedly raised the toast, 'Wilkes and Liberty.'" Lawrence H. Gipson, Vol. XI, *The British Empire Before the American Revolution* (New York, 1965) [14]

The struggle of Wilkes against the arbitrary right of a legislature to reject elected representatives of the people who otherwise meet the qualifications of law became intertwined with America's own cause. As a leading biographer of Wilkes wrote:

> "It was a matter of common agreement at the time that the resistance of Wilkes to oppression had an immediate effect upon America. . . . The popularity of Wilkes has left its mark on the map of America. Wilkes County in Georgia has disappeared, but Wilkes county in North Carolina has Wilkesboro as its chief town, and Wilkes-Barre in Pennsylvania commemorates both him and Col. Isaac Barre . . . Children were named after him."
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> "Names like Quincy, Hancock, and Adams now bulk enormous in American history; Wilkes is forgotten. But here [in the surviving correspondence between Wilkes and the Sons of Liberty] they are small men patiently soliciting the attention of a great one. . . . They formed in the eyes of the world but one section of the great mass of supporters of Wilkes and they would not at this time have objected to the

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[14] It is indicative of the American identification of the cause of Wilkes with their own struggle that a popular song of the Revolutionary Period, entitled "Fish and Tea" linked the name of Wilkes together with the other most prominent and beloved English supporters of the American cause, the Earl of Chatham, Edmund Burke, Lord Camden, Colonel Isaac Barry, and Sergeant Glynn [Wilkes chief advisor and counsel]. See *Diary of the American Revolution*, compiled by Frank Moore and edited by John Anthony Scott (N.Y., 1967).

description of themselves as Wilkesites." Postgate, *That Devil Wilkes* (New York, 1929) [15]

The cause which Wilkes had become identified with—the right of free men to select their own representatives subject only to restrictions of fundamental law—was recognized in the mother country itself as at the very center of the struggle for American independence.[16]

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[15] The Boston Sons of Liberty wrote to Wilkes in 1768 to congratulate him on his return to England from exile and his second election, Here, in part, is what they said:

> "The friends of Liberty, Wilkes, Peace and good order, assembled at the Whig Tavern, Boston, New England, take the first opportunity to congratulate your country, the British Colonies, and yourself on your happy return to the land, alone worthy of such an inhabitant. Worthy! as they have lately manifested an incontestable proof of virtue in the honorable and important trust reposed in you by the county of Middlesex."
>
> Benj: Kent — John Adams
> Thos: Young — Jos. Warren
> Benj: Church

The Sons of Liberty to John Wilkes, Boston, June 6, 1768. See Postgate, *supra* at pp. 11-12.

See also Bancroft, *History of the United States,* Vol. III (1879 ed.) "The cry for 'Wilkes and Liberty' was heard in all parts of the British dominion", at p. 373.

[16] In the course of the parliamentary debate in 1781 on the question of expunging the exclusion resolution, the debates report:

> "Mr. Turner said, that the resolution complained of [the exclusion of Wilkes] was no subject of merriment. It had in fact been one of the great causes which had separated this country from America. It had given the colonies just reason to distrust the parliament of Great Britain. After such a resolution they could no longer consider them as the constituents of the people, but the packed adherents of a profligate ministry. Was not the suspicion but too well founded?. . . They were no more to be considered as the representatives of the people. He called upon them with the most anxious concern, to rescue themselves from the imputation of such vassalage, and in doing this they would more effectually invite the Americans to a return of their confidence, than by any other step whatever." Parliamentary Debates, 21 George III, 100 (1781).

The concepts underlying Wilkes struggle for the freedom of selection of legislators by the people limited only by fundamental law reflected the very essence of the principles Madison insisted upon on the floor of the Philadelphia Convention. In an address to the freeholders of Middlesex after his second exclusion from Parliament, Wilkes wrote:

> "If ministers can once usurp the power of declaring who shall *not* be your representatives, the next step is very easy and will follow speedily. It is that of telling you, whom you *shall* send to Parliament, and then the boasted Constitution of England will be entirely torn up by the roots." Postgate, The Sons of Liberty to John Wilkes, Boston, 1768.

The debates in the Commons resulting eventually in 1782 in the expunging of the resolutions of exclusion reflect those concepts which Madison said must be the "lesson worthy of our attention." Farrand, Vol. 2, p. 250.[17]

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[17] A few excerpts from the Parliamentary debates urging the expunging of the Wilkes exclusion resolutions highlight those principles which the Founders drew upon in Philadelphia in concluding that no power must be vested in the legislature to refuse to seat an elected representative of the people who meets the qualifications for office established by constitutional law. Consider, for example, these statements made on the floor of Commons in 1775:

> "But, Sir, I beg leave to assert, that this was not the case in the Middlesex business. Mr. Wilkes was qualified by the law of the land:
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> * * *
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> "This House, Sir, is created by the people, as the other is by the king. What right can the majority have to say to any county, city, or borough, you shall not have a particular person to be your representative, only because he is obnoxious to us, when he is qualified by law? Every county, city, or borough, has an equal right with all other counties, cities, and boroughs, to its own choice, to its own distinct deputy in the great council of the nation. Each is free and independent, invested with

(Footnote continued on next page)

The fundamental principles underlying the Philadelphia conclusions flowed from a recognition that the right to choose a representative is an inherent right of the people

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(Footnote continued from preceding page)

precisely the same powers." Parliamentary Debates, 15 George III, 366 (1775).

Or in these ringing words of Mr. Wilkes in arguing for the expunging of the exclusion resolution:

> "In the first formation of this government, in the original settlement of our constitution, the people expressly reserved to themselves a very considerable part of the legislative power, which they consented to share jointly with a King and House of Lords. From the great population of our island this right could not be claimed and exercised personally, and therefore the many were compelled to delegate that power to a few, who thus were chosen their deputies and agents only, their representatives. It follows directly from the very idea of a choice, that such choice must be free and uncontrouled, admitting of no restrictions, but the law of the land, to which the King and the Lords are equally subject, and what must arise from the nature of the trust. . . . The freedom of election is, then, the common right of the people of England, their fair and just share of power; and I hold it to be the most glorious inheritance of every subject of this realm, the noblest, and, I trust, the most solid part of that beautiful fabric, the English constitution. . . . The House of Peers, Sir, in the case of *Ashby* and *White* in 1704, determined, 'a man has a right to his freehold [by the common law; and the law having annexed his right of voting to his freehold] it is of the nature of his freehold, and must depend upon it.' On the same occasion likewise they declared, 'it is absurd to say, the elector's right of chusing is founded upon the law and custom of parliament. It is an original right, part of the constitution of the kingdom, as much as a parliament is, and from whence the persons elected to serve in parliament do derive their authority, and can have no other but that which is given to them by those that have the original right to chuse them.' The greatest law authorities, both ancient and modern, agree in the opinion, that every subject of the realm, not disqualified by law, is eligible of common right. . . . This common right of the subject, Sir, was violated by the majority of the last House of Commons; and I affirm, that they, and in particular, if I am rightly informed, the noble lord with the blue ribband, committed by that act high treason against

which can be restricted only by the fundamental law made by the people. This was the heart of the Wilkes argument:

> "The laws of the land are of no avail, when this House alone can make a new law, adapted to the caprice, violence, or injustice of every emergency, and when representation in parliament no longer depends upon the choice of the electors. . . . Can there be a more solemn mockery of the rights of a free people?" Parliamentary Debates, 16 George III, 1339 (1776)

> "Where, however, there is no *natural or legal disability, the capacity of being elected is the in-*

Magna Charta. This House only without the interference of the other parts of the legislature, took upon them to make the law. They adjudged me incapable of being elected a member to serve in that parliament, although I was qualified by the law of the land, and the noble lord declared in this House, 'if any other candidate had only six votes, he would seat him for Middlesex.' I repeat it, Sir, this violence was a direct infringement of Magna Charta, high treason against the sacred charter of our liberties. The words to which I allude, ought always to be written in letters of gold: 'No freeman shall be dis-seized of his freehold, or liberties, or free customs, unless by the lawful judgment of his peers, or, by the law of the land.' By the conduct of that majority, and of the noble lord, they assumed to themselves the power of making the law, and at the same moment invaded the rights of the people, the King, and the Lords. The two last tamely acquiesced in the exercise of a power, which had been in a great instance fatal to their predecessors, had put an end to their very existence; but the people, Sir, and in particular the spirited freeholders of this country, whose ruling passion is the love of liberty, have not yet forgiven the attack on their rights. So dangerous a precedent of usurped power, which may in future times be cited and adopted in practice by a despotic minister of the crown, ought to be expunged from the Journals of this House." Parliamentary Debate, 15 George III, 361-363.

[It is of some passing interest that the Wilkes exclusion resolution *has* been cited as authority for the power of the House to exclude Congressman-Elect Powell by the defendants in their brief to the District Court. Appellees' brief to the District Court at pp. 25-26.]

herent right of every freeman of the realm. He cannot be divested of it without an equal injury to the party, and to the constituent, in whom the power is constitutionally lodged of determining whom he thinks the most fit and proper person to act for him in the great council of the nation. The declaration of the House therefore, that any man, *duly qualified by law,* shall not be allowed to sit in parliament as a representative of the Commons of the realm, was assuming to themselves the making of a new law, to which only the three estates are adequate. It was disfranchising a whole county, and consequently in effect the united kingdom. . . . It is scarcely possible, Sir, to state a question in which the people of this free country are more materially interested than in the right of election, for it is the share, which they have reserved to themselves in the legislature. When it was wrested from them by violence, the constitution was torn up by the roots." (emphasis added) Parliamentary Debates, 16 George III, 1338

The exclusion of an elected representative on grounds not stated in the fundamental law was, in Wilkes' words, a usurpation of the power of the people which, as Madison warned, was subversive of a free constitution:

"By this arbitrary and capricious vote the House established an incapacity unknown to the laws of the land. It is a direct assuming of the whole legislative power, for it gives to the Resolution of one House the virtue of an act of the entire legislature to bind the whole. The King, the Lords, the Commons of the realm, suffer alike from this usurpation. It effectually destroys both the form and essence of this free constitution. The right of representation is taken away by this vote. It is difficult, Sir, to decide, whether the despotic body of men, which composed the last rotten parliament, intended by the whole of their conduct in the Middlesex elections to cut up by the roots our most invaluable franchises and privileges, or only to sacrifice to the rage of an incensed court one obnoxious individual. In either

case the rights of the nation were betrayed by that parliament, and basely surrendered into the hands of the minister, that is, of the crown.

"We are, Sir, the guardians of the laws. It is our duty to oppose all usurped power in the King or the Lords. We are criminal, when we consent to the exercise of any illegal power, much more, when we either exercise, or solicit it ourselves. . . . This declaration, in my opinion, transfers from the people to this House the right of election, and by an uncontrouled exercise of the negative power, the House in effect assume the positive right of making whom they please the representatives of the people in parliament." Parliamentary Debates, 17 George III, 193

The danger which Madison and the Founders saw in a doctrine which would give to a legislature the power to reject representatives of the people qualified by law echoed the dangers eloquently warned against by Wilkes in the House of Commons:

"This usurpation, if acquiesced under, would be attended with the most alarming consequences. If you can reject those disagreeable to a majority, and expel whom you please, the House of Commons will be self-created and self-existing. You may expel till you approve, and thus in effect you nominate. The original idea of this House being the representative of the Commons of the realm will be lost. The consequences of such a principle are dangerous in the extreme. A more forcible engine of despotism cannot be put into the hands of a minister." Parliamentary Debates, 15 George III, 368

In 1782, five years before the Philadelphia Convention, the long battle of John Wilkes to vindicate the elementary rights of the British electorate to choose freely representatives otherwise qualified by fundamental law culminated in a motion carried by the House expunging the resolutions of exclusion "as being subversive of the rights of

the whole body of electors of this Kingdom." Parliamentary Debates, 22 George III, 1411.[18]

The Framers of Article I, Clause 2 and Article I, Clause 5 found the "taproots" of these clauses in the parliamentary struggles of John Wilkes. *Cf.* Mr. Justice Frankfurter in *Tenney* v. *Brandhove,* 341 U.S. at 372. These clauses are understandable "once they are related to the presuppositions of our political history". *Tenney* v. *Brandhove, supra* at p. 372. Viewed in the light of the history of the Wilkes controversy, the "lesson" Mr. Madison called "worthy of our attention",[19] it becomes overwhelmingly clear that the intention of the Framers was that the Legislature was utterly without power to refuse to seat a representative duly elected by the people who meets all constitutional qualifications for office. The recent conclusions of an eminent English historian seem peculiarly relevant and sadly ironic when related to the present case:

> "Over the Middlesex election, Wilkes seems to us so obviously right that we cannot understand a government disputing it. Had the precedent been

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[18] The resolution is reported in the debates in this manner:

"Lord Mahon, Lord Surrey, sir P. J. Clerke, and the Secretary at War spoke also for the motion: the House at last divided, when there appeared for expunging, 115; against it 47. The same was expunged by the clerk accordingly. It was then ordered, 'That all the declarations, order, and resolutions of this House respecting the election of John Wilkes, esq. for the county of Middlesex, as a void election, the due and legal election of Henry Laws Luttrell, esq. into parliament for the said county, and the incapacity of John Wilkes, esq. to be elected a member to serve in the said parliament be expunged from the Journals of this House, as being subversive of the rights of the whole body of electors of this kingdom.'"

[19] Compare George Bancroft's characterization in his famous history of the United States as to the "lesson" of the Wilkes affair. "In disfranchising Wilkes by their own resolution, without authority of law, they violated the vital principle of representative government." Bancroft, *History of the United States,* Vol. IV, p. 157.

established that a member could be elected not by his constituents but by a majority of his own party in the House of Commons, there are no limits to the use which might have been made of it . . . By arousing the people of England in defense of their right to elect their own representatives, Wilkes insured that no government would ever again infringe it." Charles C. Trench, *Portrait of a Patriot* (London 1962)

(iii) *The period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution gave to the Legislature any power to refuse to seat an elected representative of the people who met the qualifications for membership in either house explicitly set forth in the Constitution itself.*

The history of the period of ratification of the product of the Philadelphia convention by the state ratifying conventions reveals clearly that if the vast unfettered discretion lodged in the House to refuse to seat a duly elected Representative who meets all expressly stated constitutional requirements for membership urged now by the majority of the present house [20] had in fact been the intention of the framers in writing the Constitution "it would not have been ratified." *Newberry* v. *United States,* 256 U.S. 232 (1920).

a) It is often forgotten that when the document which emerged from the Philadelphia convention was submitted to the states for ratification, "few of its authors and supporters imagined that it would be easy to win such a margin for approval in the chaotic political circumstances of the world's first experiment in popular government over an extended area: all recognized that a clear-cut vote against the Constitution in any one of four key states would be

[20] See Brief for Defendants below at pp. 32, 33.

enough by itself to destroy their hopes for 'a more perfect union.' "[21] New York was such a state "that plainly could be lost and yet had to be won."[22] With this in mind, Alexander Hamilton, enlisting the efforts of James Madison and John Jay, wrote a series of newspaper essays designed to "explain and support the proposed Constitution."[23] These essays, now known to posterity as the Federalist Papers, not only have always "commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States,"[24] but reflect the analysis of the meaning of the Constitution by its most prominent supporters which in their opinion was essential to obtain the support of the key states upon whose decisions the hope for ratification rested.[25]

Within this understanding of the significance of these essays the analysis in the Federalist Papers of the limitations of the power set by the Constitution upon the Legislature to refuse to seat a duly elected representative of the people who meets all the express qualifications set by that document itself assumes special significance. Alexander Hamilton faced this question head on in Number Sixty of the Papers. In meeting the fear of many that the new Constitution provided preference for the "wealthy and the well-born", Mr. Hamilton countered this deep-seated distrust of the proposed Constitution by writing the following words:

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[21] Professor Clinton Rossiter, Introduction to the Federalist *Papers,* the Federalist Papers (April 1961, Mentor Book edition) p. viii. See also Cecelia M. Kenyon, editor, *The Anti-Federalists* (N. Y., 1966) p. xcvii and Edmond S. Morgan, *The Birth of the Republic,* 1763-1789 (Chicago, 1956) pp. 149 to 155.

[22] Rossiter, *supra,* at p. ix.

[23] Rossiter, *supra,* at p. ix.

[24] Rossiter, *supra,* at p. vii.

[25] Rossiter, *supra,* at p. viii.

> "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*" [26] (Emphasis added)[27]

This analysis in the Federalist Papers of the central constitutional question in this case emphasizes clearly that the limitations upon the power of the legislature to refuse to seat a duly elected representative of the people who meets the qualifications for office set by the people themselves in the fundamental compact was no minor technical question of the housekeeping duties of the House—but was at the storm center of one of the most critical eras in our history, the moment of decision as to whether the "world's

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[26] Federalist Papers, No. 60 (Mentor edition), p. 371.

[27] See also James Madison's words in Number 52 of the Federalist Papers, at p. 326:

> "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, *have been very properly considered and regulated by the convention.* A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to property or wealth, or to any particular profession of religious faith." (emphasis added)

first experiment in popular government"[28] would be accepted by the new nation.

b) As Professor Rossiter points out in his recent analysis of the ratifying period, the State of New York was pivotal to the success or failure of ratification.[29] The analysis of the constitutional limitations on the power of the House advanced in and accepted by New York State Ratification Convention are accordingly of great significance, for, as Professor Rossiter concludes, "plainly it was a state in which arguments voiced in public debate or actions taken in the ratifying convention might influence the course of events in other states."

Alexander Hamilton assumed leadership in the New York convention in urging ratification. In expounding upon the fundamental principles underlying the new Constitution he stressed the concept which was the bedrock of his interpretation of Article One, Clause 2, and Article One, Clause 5, contained in Number 60 of the Federalist Papers. In words which echo the true meaning of the case now brought before this Court, Hamilton said to the New York convention:

> *"After all, Sir, we must submit to the idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should*

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[28] Rossiter, *supra*, p. viii.

[29] "One of these states was New York, among whose claims to a vital role in the affairs of the new republic were a growing population, a lively commerce, a pivotal position on the Atlantic seaboard, and New York City, then the seat of the government of the United States. It was also the home of Governor George Clinton, a doughty politician whose principles and prejudices and skills made him the most formidable of opponents to the proposed Constitution. Plainly New York was a state that could easily be lost and yet had to be won." Rossiter, *supra*, p. viii.

> *be perfectly pure, and the most unbounded liberty allowed.*" [30] (emphasis added)

No words could more clearly express the basic first precepts of our system of government which the action of the majority of the House on March 1st of this year has now placed in jeopardy.[31]

Again, Robert Livingston, a powerful supporter of the Constitution,[32] placed in the sharpest terms the concept which lies at the very heart and core of this case:

> "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." [32a]

The refusal of the majority of the House to seat the duly elected representative of the people of the 18th Congressional District of New York, who by the House's own

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[30] Elliot's Debates, Book I, Vol. II (Lippincott Co., 1836), reprinted in limited edition by the Michie Company, Charlottesville, Va., 1941), p. 257.

[31] The importance of this analysis by Mr. Hamilton that "the true principle of a republic is that the people should choose whom they please to govern them" is highlighted by Mr. Hamilton's insistence in defending the concept that Senators were then to be chosen by state legislatures, that the choice of members of the House was to be solely within the power of the people themselves, for, as he said, "Here, Sir, the people govern; here they act by their immediate representatives." Elliott's Debates, *supra*, at p. 348.

[32] Robert R. Livingston (1746-1813) was one of the most substantial of the New York landowners, politically one of the first men of the State during the Revolutionary era, and a member of the Continental Congress. He was first Secretary of State for Foreign Affairs, and later Minister to the Court of France. He is perhaps best known as one of the most distinguished Chancellors of New York. See George Dangerfield, *Chancellor Robert R. Livingston of New York* (N. Y., 1960).

[32a] Elliot's Debates, *supra*, at pp. 292, 293.

findings meets all qualifications for membership in that body which the people themselves have established in the fundamental law, was an action wholly beyond the power of the House. In the words of Mr. Livingston, relying upon which the people of the State of New York ratified the Constitution, this action "abridge[d] their natural rights."

c) Pennsylvania was another critical state in securing ratification. In this convention, James Wilson, later Justice of this Court, stressed the critical significance of the constitutional provisions which left solely to the people the choice of their representatives subject only to qualifications set by the people themselves in the Constitution. He pointed out that this was the postulate which lies first at the very foundation of all authority whatsoever which is vested in the national government. Thus Mr. Wilson argued to the Pennsylvania convention:

> "All authority, of every kind, is *derived by* REPRESENTATION from *the* PEOPLE, and the DEMOCRATIC *principle is carried into every part of the government.*" (Italics and capitalization are in the original Elliot Debate journals.) [33]

In this succinct statement Mr. Wilson, later Mr. Justice Wilson, captured the essence of the thinking which lay behind the original Philadelphia decisions.[34] The very authority, the very dignity, the very power itself, of the House of Representatives, lies in the fact that it must be

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[33] Elliot's Debates, *supra*, at p. 482.

[34] James Wilson (1742-1798) was a delegate to the Continental Congress from Pennsylvania in 1775 and a signer of the Declaration of Independence. He was a member of the Philadelphia Constitutional Convention and a member of the Pennsylvania ratifying convention. He was one of the first Justices of this Court. He was the first Professor of Law in the University of Pennsylvania in 1790. See *Harper's Encyclopedia of United States History* (N. Y., 1905), Vol. 10, pp. 398, *et seq.*

composed of representatives who reflect the unfettered free choice of the people, undictated to, uncontrolled, and subject only to qualifications which the people themselves have established in their original solemn compact. [Cf. speech of Mr. Livingston in the New York ratifying convention, *supra*, at p. 24.] An affirmation of the principles, laid down in the Philadelphia convention and embodied in the spirit of the ratifying conventions, far from infringing upon the dignity of the House (cf. Respondent's brief below, at p. 39), would strengthen and solidify those foundation postulates upon which the dignity, power, and prestige of that House ought rightly to rest.[35]

(d) Another state which held the balance of ratification in its hands was Virginia. Facing the intense opposition of Patrick Henry and other champions of popular democracy the pro-Constitution forces rallied their strongest arguments. Once again the free unhindered right of the people to choose their own representatives subject only to qualifications they themselves set in the Constitution become a central theme in the arguments of those supporting ratification. In response to the charges that the new document was aristocratic in nature and violated the prin-

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[35] It is most interesting that in the same speech in which Wilson expressed the above observations he made amply clear his firm conviction that when the legislature intruded into this area of power restricted to the people from which the very power of the legislature stems that "under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion on a former day, to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges —when they consider its principles, and find it to be incompatible with the superior power of the Constitution—it is their duty to pronounce it void." Elliot's Debates, *supra*, p. 440.

ciples of democracy,[36] Mr. Nicholas[37] relied upon the following interpretation of Article One, Clause Two, to meet head-on the anti-ratification arguments:

> "Secondly, as it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. *This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state.*"[38] (Emphasis added.)

Nothing could be clearer from the implications of the Virginia convention debates that if the interpretation of Article One, Clause Two, and Article One, Clause Five, urged upon the District Court as a rationale for a broad unbounded discretion in the House to refuse to seat a duly elected representative who meets all constitutional qualifications was accurate, the Constitution "would not have been ratified" by Virginia. See *Newberry* v. *United States, supra,* at p. 256.

The history of the ratifying conventions and in particular those held in New York, Pennsylvania and Virginia, a defeat in any one of which would have destroyed the hopes "for a more perfect Union"[39] reveals that perhaps no more persuasive argument was advanced to lay to rest the fears of many that the new experiment was designed to usurp the powers of the people, than the re-

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[36] See for example speech of Mr. Henry, Elliot's Debates, *supra,* Vol. III, p. 43 *et seq.*

[37] Wilson Carey Nicholas (1757-1830), was an officer in the Revolutionary War, Commander of Washington's Life Guard, United States Senator in 1799 to 1804, Member of Congress in 1807 and Governor of Virginia from 1814 to 1817. *Harper's Encyclopedia of U.S. History,* Vol. 6, p. 465.

[38] Elliot's Debates, *supra,* Vol. III, at p. 8.

[39] Rossiter, *supra,* at p. viii.

peated assertion of the proponents of the new Constitution, most eloquently expressed in the words of Hamilton before the New York Convention that the proposed fundamental law reflected fully the "true principle of a republic—that the people should choose whom they please to govern them"—"that representation is imperfect in proportion as the current of popular favor is checked" and that accordingly, "this great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[40]

The experiences of these crucial ratifying conventions reinforce beyond any question the careful conclusion of Professor Warren based upon the history of the Philadelphia Convention that "the Convention did not intend to grant to either branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members other than those qualifications established by the Constitution itself," and that "the elimination of any power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualification."[41]

This constitutional conclusion, in the words of Hamilton is "the true principle of a republic".[42] It reflects as Chancellor Livingston said to the New York ratifying convention the axiom which underlies our entire theory of government—that "the people are the best judges who ought to represent them".[42a] This was the understanding upon which the people of the State of New York ratified the Federal Constitution. For a majority of the House to refuse the seat a representative of the people of this

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[40] Elliot's Debates, *supra*, p. 257.

[41] *Warren, supra*, at pp. 421, 422.

[42] Elliot, *supra*, at p. 257.

[42a] Elliot, *supra*, at p. 292.

State, duly elected by his fellow citizens, and who admittedly, and by finding of the House itself, "possesses the requisite" constitutional qualifications for membership in this House is to violate the original understanding of the basic compact. In the words of Chancellor Livingston it "is to abridge—the natural right" of the people of this State, the right the Constitution recognized, to "choose whom they please to govern them." The preservation of this compact—the protection of the fundamental law which has established those principles which "the people have an original right to establish" and which "in their opinion, shall most conduce to their own happiness . . . so established, are deemed fundamental" is the highest duty of this Court to perform. *Marbury* v. *Madison,* 1 Cranch 137. In ratifying the Constitution the people of this State were assured that their "natural right" to choose representatives "whom they please to govern them" was written into the fundamental law. This Court has proudly stated that the government of the United States established by this written Constitution "has been emphatically termed a government of laws and not of men." *Marbury* v. *Madison, supra,* at p. 162. No higher responsibility is placed upon this Court when the citizens of New York turn here "to claim the protection of the laws" *Marbury* v. *Madison, supra,* at p. 162, for this serious violation of the "natural right" to choose whom they please to govern them which they were solemnly assured was contained within the written Constitution. In perhaps no case in the recent history of the Court has it been more awesomely clear that if "the laws furnish no remedy for the violation" of this fundamental right—for this breach of the original covenant between the people of the State of New York and the Nation—this government of ours "will certainly cease to deserve this high appellation"—that it is truly "a government of laws and not of men." *Marbury* v. *Madison, supra,* at p. 162.

(iv) *This Court has consistently reaffirmed the conclusion that the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all the qualifications for membership set forth in the Constitution.*

The precise constitutional questions presented by this Petition and the fundamental premises underlying the limitation upon legislative power adopted by the Philadelphia Convention and reflected in the ratifying conventions have been authoritatively discussed by this Court and only recently vigorously reaffirmed.

In *Newberry* v. *United States*, 256 U.S. 232 (1920), the Court had the occasion directly to reaffirm the conclusion of the Philadelphia Convention that the House has no power under the Constitution to vary in any way the qualifications for membership in the House set forth in the Constitution. This discussion occurred in both the majority opinion of the Court and the concurring opinions of Mr. Justices Pitney, Brandeis and Clarke. Significantly, while the majority and concurring Justices disagreed on the main issue of the case—whether a primary election fell within the meaning of the word "Elections" in Article I, Section Four—all the Justices specifically agreed upon the proposition that the legislature had no constitutional power to alter in any way the qualifications for membership in either House expressly set forth in the Constitution.

In Mr. Justice McReynolds' opinion for the Court, 256 U.S. at 243 (joined in by Mr. Justice Holmes, Mr. Justice McKenna, and Mr. Justice Day) the position is squarely taken that the legislature has no power to deviate from or alter the qualifications for membership in either House set forth in the Constitution. Thus the opinion for the Court states, at p. 255:

> "Section Four was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally

> to destroy the States. In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon. Mr. Hamilton asserted: 'The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions are defined and fixed in the Constitution and are unalterable by the Legislature.' The Federalist, LIX, LI. The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the latitude we are now asked to sanction, it would not have been ratified. See Story on the Const. §§ 814, *et seq.*[43] 256 U.S. at p. 255-256.

The concurring opinion of Mr. Justice Pitney, joined in by Mr. Justice Brandeis and Mr. Justice Clarke is equally emphatic in reaffirming the conclusions of the Philadelphia Convention that the legislature had no power to add, alter, or vary the constitutional qualifications for membership in either House. Thus the concurring opinion also adopts approvingly the statements and analysis of Hamilton in Number 60 of the Federalist Papers:

> "What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the

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[43] The opinion of the Court proceeds to make it unmistakably clear which are the constitutional qualifications for membership in the House which are "defined and fixed" and "unalterable by the legislature" in its subsequent comment at page 256, "Who should be eligible for election was also stated. 'No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected, be an inhabitant of that State in which he shall be chosen.'" 256 U.S. at p. 256.

> places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest'; and it was to support his contention that there was 'no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times*, the *places*, and the *manner* of elections.' This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. The restriction arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed." 256 U.S. at 283-284.

The unanimous agreement of the Court in *Newberry* as to the constitutional limitations upon the power of the legislature to alter, vary or deviate from the qualifications for membership in the House, set forth in the Constitution itself, was explicitly reaffirmed by this Court in 1940 in *United States* v. *Classic,* 313 U.S. 299, which resolved the precise issue as to whether primary elections were "elections" subject to regulation by Congress within the meaning of Section 4 of Article I, which as the Court pointed out had "not been prejudged" by the prior decision in *Newberry. United States* v. *Classic,* 313 U.S. at 317.[44]

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[44] See also 40 Mich. L. Rev. 460 (1941); 36 Ill. L. Rev. 475 (1941); 10 Geo. Wash. L.R. 625 (1941).

In *Classic*, the Court in the opinion of Mr. Justice Stone repeatedly reaffirmed and restated the fundamental premises which grounded the unanimous conclusion of the Court in *Newberry*—that the legislature may not interfere with the free choice of representatives who meet constitutional qualifications for membership in the House. In words reminiscent of the tone of the statements of the Founders, Mr. Justice Stone reminded the Nation once again:

> "That the free choice by the people of representatives in Congress, *subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution*, was one of the great purposes of our constitutional scheme of government cannot be doubted." 313 U.S. at 316. (Emphasis added.)

As Mr. Justice Stone wrote, ". . . a dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I", *United States* v. *Classic*, *supra*, at pp. 318, 320.[45]

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[45] Only recently in *Stassen for President Citizens Committee* v. *Jordon*, 377 U.S. 914, in a case in which the issue raised was unrelated to the constitutional questions presented in this petition, in their dissent from the denial of the petition for writ of certiorari, 377 U.S. at 927, Mr. Justice Douglas, the Chief Justice, and Mr. Justice Goldberg saw fit to restate the powerful words of Mr. Justice Stone in *Classic* that "the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted" at p. 978. This reference to the statement in the *Classic* majority opinion, by Mr. Justice Douglas who dissented in *Classic*, emphasizes the obvious point that the *Classic* dissenting judges, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Murphy did not base their dissent from the result of the case upon any disagreement with Mr. Justice Stone's formulation of the fundamental constitutional question which is decisive in the present petition.

The unanimous views of the Justices in *Newberry* concerning the constitutional prohibition upon legislative power to alter or disregard constitutional qualifications for membership reaffirmed by the discussion in *Classic,* was dispositively treated by the Court in this Term in the landmark decision in *Bond et al.* v. *Floyd et al.* —— U.S. ——, 87 S.Ct. 339 (December 5, 1966).

a) The unanimous opinion in this Term in *Bond* v. *Floyd, supra,* is the logical extension of the analysis of the Court expressed first in *Newberry,* reaffirmed in *Classic* and now the gravamen of the decision in *Bond.* In understanding the teaching of this Court in *Bond* in respect to the fundamental constitutional proposition at stake in this Petition it is essential to examine first the thoughtful dissenting opinion of Chief Judge Tuttle in the three-judge court which became in a critical way the foundation stone upon which this Court's opinion in *Bond* rests.

As we will demonstrate, in *Bond* this Court does not disagree with Chief Judge Tuttle's direct holding that the Georgia Legislature had no power to refuse to seat Representative-Elect Bond since he met all the stated qualifications set forth in the Georgia Constitution. Rather, the Court would seem to assume the soundness of this proposition (see footnote 13 to the Court's opinion), and proceeds to meet Georgia's second line argument that the State is merely testing one of the constitutional qualifications—the requirement of taking the constitutional oath. This Court's opinion disposes of this contention of the State by its conclusion that the result of the State's asserted power to "look beyond the plain meaning of the oath provisions", —— U.S. —— 87 S.Ct. at 346, in order to determine whether this Representative-Elect "may take the oath with sincerity", —— U.S. ——, 87 S.Ct. at 346, as applied to the facts of this case, violated the First Amendment to the Federal Constitution,. —— U.S. ——, 87 S.Ct. at 350.

Chief Judge Tuttle met the primary constitutional issue posed in this petition in a forthright manner. In the face of a concession by the State that the Representative-Elect met all the stated qualifications for membership in the House, see 87 S.Ct. at 346, Chief Judge Tuttle remarked:

> "In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is 'qualified,' the legislature, as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative-Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice."

Chief Judge Tuttle then explained in a clarifying manner a question which has seemed to confuse many commentators in the past as to why there have been few direct legal precedents exactly on this issue. He pointed out:

> "It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as their representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further, it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court." 251 F. Supp. 333, 352.

Because of the understandable paucity of judicial opinions, Chief Judge Tuttle relied heavily upon the legislative precedents we discuss *infra* at pp. 53-7. However, in addition, he placed great emphasis upon the once-famous, but now rarely remembered, Report of the Association of the Bar of the City of New York in 1920 under the Chairmanship of Charles Evans Hughes, later Chief Justice of this Court, including such distinguished representatives of the American bar as Joseph M. Proskauer, Ogden L. Mills, Morgan J. O'Brien and Louis Marshall. The Committee was appointed at the time of the expulsion of five members of the Socialist Party from the New York State Assembly. Its mandate from the Bar Association was to "appear before the Assembly or its Judiciary Committee and take such action as is required to safeguard and protect the principles of representative government guaranteed by the Constitution which are involved in the proceedings now pending."

The Committee filed a brief because as they said they regarded "these proceedings as inimical to our institutions, because they tend to subvert the very foundation upon which they rest—representative government."

Chief Judge Tuttle singled out for consideration the conclusion of this eminent committee of American lawyers concerning the critical constitutional question as to the power of a legislature to exclude a duly elected member for grounds other than expressly stated in the Constitution.[46]

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[46] Although the Committee made it plain in its reports that the New York Assembly action was an action for *expulsion* rather than one to determine the qualifications of its members, it felt that it was critical, because of legislative and public confusion on this point, to state its views on the power of a legislature to judge the "qualifications" of elected members. See *Bond* v. *Floyd*, *supra*, at p. 353.

The Committee stated in its Brief its measured opinion as to this fundamental issue:

> "We contend that the opinion expressed by Senator Knox in the case of Senator Smoot,[47] supra, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications. . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in Barker v. People, 3 Cowen, 703, which, although decided in 1824, and therefore involving the interpretation of an earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust. . . . *Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution, wholly free to confer public stations upon any person, according to their pleasure. The Constitution* giving the right of election and the right of appointment; these rights consisting . . . essentially in the freedom of choice; and the Constitution also declaring that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the *absolute liberty* of electors and the appointing authorities, *to choose* and to appoint *any person, who is not made ineligible by the Constitution.* . . . I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications, which the Constitution has not required'. . . ." (Emphasis supplied by Chief Judge Tuttle.)
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> Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920.

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[47] See p. 76, *infra*.

Based upon all of these considerations, Chief Judge Tuttle concluded as a matter of law that "it is clear that Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives" 251 F. Supp. 333, at 357.

(b) As we have pointed out above, this Court does not appear to disagree with Chief Judge Tuttle's conclusion on the basic constitutional question here involved. Quite to the contrary, in the course of its refutation of Georgia's secondary line of defense that all it was doing was *testing* a constitutional qualification—the necessity of an oath supporting the Constitution—the Court saw fit to set forth in full the fundamental policy reasons we have discussed previously which led the Framers to conclude that the qualifications of members of either House are "defined and fixed by the Constitution" and "are unalterable by the legislature." [48]

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[48] Fn. 13 of the opinion summarizes these conclusions of the Framers:

"Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, *The Making of the Constitution* (1938), 420-422. The Journal of the Federal Convention of 1787 states:

"'Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution * * * Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partisans of a weaker faction.

* * *

"'Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors,

(Footnote continued on next page)

The entire structure of the unanimous Bond opinion in this Court confirms the impression that the Court is in accord with the conclusions of the Framers that the qualifications of representatives of the people were defined and fixed by the Constitution and are unalterable by the Legislature. The Court points out that as to "the only stated qualifications for membership in the Georgia legislature—the State concedes that Bond meets them all" 87 S. Ct. at 346. In this Court, Georgia did not argue at any length, and if it did, this Court did not think the argument even worthy of extended response, that a legislature has unbounded discretion to set new standards and qualifications for membership.[49] Instead the entire Bond opinion is predicated upon the assumption by both the Court and the State that the Legislature is, indeed, bound by the stated constitutional qualifications. As we have noted, the State's primary line of defense was that it had a right to test the sincerity of the meeting of a constitutional qualification—the taking of an oath in support of the Constitution. The Court rejected this defense by pointing out that disqualification even "under color of a proper standard" is reviewable and beyond the power of the House if it violates other constitutional prohibitions—in this case the First Amendment.

(Footnote continued from preceding page)

and the elected: and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties.' 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-250.

"Hamilton agreed with Madison that:

" 'The qualifications of the persons who may choose or be chosen * * * are defined and fixed by the constitution: and are unalterable by the legislature.' The Federalist, No. 60 (Cooke ed. 1961), 409."

[49] Cf. the contentions of the respondents below in their brief, at page 34.

Unlike the respondents in this case,[50] Georgia did not "claim that it should be completely free of judicial review", 87 S.Ct. at 346. It sought to convince this Court that its action of exclusion was based upon the testing of a *proper* constitutional qualification—the necessity of taking an oath. Both the Court and the State therefore implicitly adopted Chief Judge Tuttle's incisive analysis of the fundamental constitutional issue presented in this Petition. The entire posture of the *Bond* case in this Court would tend to confirm the observation of the Chief Judge of the Fifth Circuit that the argument that a Legislature may disregard, enlarge upon, or alter the express constitutional qualifications for a duly elected member of the Legislature "shocks not only the judicial, but also the lay sense of justice." *Bond* v. *Floyd*, 251 F.Supp. 333 at page 352.[51]

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[50] On oral argument before the Court of Appeals on the motion for summary reversal, counsel for the respondent took the position that the House was free of judicial review regardless of the grounds of exclusion even including exclusion on the basis of race, religion, or politics. See transcript of oral argument on file in this Court. See Point II, *infra*.

[51] The decisions in the state courts uniformly followed the principles enunciated in this Court from *Newberry* to *Classic* to *Bond*—that a Legislature has no power to add to, alter or disregard constitutional qualifications for office whether in respect to the national Congress or state offices in which constitutional qualifications have been set. See, for example, *Imbrie* v. *Marsh*, 3 N.J. 578, 71 A.2d 352 (1950): ". . . to ask the question is to answer it, for if the Legislature may alter these oaths or any other provisions of the Constitution prescribing the qualifications for office (such as age, citizenship, residence and prohibition of dual office holding) it would to the extent of such variance nullify the Constitution. The maxim *expressio unius est exclusio alterius*, is peculiarly applicable here. Such has been the current not only of decisions in this State and elsewhere but of the authorities on public law. 'When the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the legislature to provide another mode of obtaining or holding the office.' *Johnson* v. *State*,

(Footnote continued on next page)

(v.) *The most recent decisions of this Court emphasize that the right of the people to choose freely and without restraint their representatives to the Congress is of the essence of a democratic society.*

This Court in recent years has ever increasingly emphasized that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and

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(Footnote continued from preceding page)

59 N.J.L. 535, 536, 538, 37 A. 949, 950, 39 (1896), at p. 356; *Buckingham* v. *State*, 42 Del. 405, 35 A.2d 903 (1944): "It is the general law that where a constitution creates an office and prescribes the qualifications that the incumbent must possess, that the legislature has no power to add to these qualifications. 1 Cooley's Constitutional Limitation, 8th Ed., 140; Meecham on Public Offices, Secs. 65 and 98; Throop on Public Offices, Sec. 73; Annotations, 47 A.L.R. 481 and 97 Am. Dec. 264." at p. 906; *Whitney* v. *Bolin*, 85 Ariz. 44, 330 P.2d 1003 (1958): "It is our opinion that the constitutional specifications are exclusive and the legislature has no power to add new or different ones."; *People* v. *McCormack*, 261 Ill. 413, 103 N.E. 1053 (1914): "Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to them, unless the Constitution gives that power. 'It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office it meant to exclude all others as prerequisites. From the very nature of such a provision the affirmance of these qualifications would seem to imply a negative of all others. * * * A power to add new qualifications is certainly equivalent to the power to vary them.' 1 Story on the Constitution, § 625. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusively or especially to electors enjoying the right of suffrage; it belongs equally to all persons whomsoever, not excluded by the Constitution. I therefore conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the Constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of prop-

any restrictions on that right strike at the heart of representative democracy"; *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (opinion of Chief Justice Warren). See also

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erty should be excluded or that a member of the assembly must be a freeholder, any such regulation would be an infringement of the Constitution; and it would be so, because, should it prevail, it would be in effect, an alteration of the Constitution itself."; *Burroughs* v. *Lyles*, 142 Tex. 704, 181 S.W.2d 570: "The qualifications for the office of State Senator are set out in Article III, Section 6, of the Constitution, Vernon's Ann. St. It was held by this Court in *Dickson* v. *Strickland*, 114 Tex. 176, 265 S.W. 1012, that where the Constitution prescribes the qualifications for office it is beyond the legislative power to change or add to the qualifications, unless the Constitution gives that power. That decision was reaffirmed in *State ex rel. Candler et al.* v. *Court of Civil Appeals et al.*, 123 Tex. 549, 75 S.W.2d 253. The statute here involved seeks to impose an additional test of eligibility other than what is prescribed by the Constitution, on a candidate for State office, and for that reason it is void."; *Campbell* v. *Hunt*, 18 Ariz. 442, 162 P. 882 (1917): "The qualifications for Governor are specifically detailed in the Constitution, and the Legislature is therefore powerless to add to or detract from the qualifications prescribed. No citation of authority is necessary here." See, also, to the same effect: *Hellmann* v. *Collier*, 217 Md. 93, 141 A.2d 908 (1958); *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950); *Stockton* v. *McFarland*, 56 Ariz. 138, 106 P.2d 328, 330 (1940); *State ex rel. Johnson* v. *Crane*, 65 Wyo. 189, 197 P.2d 864 (1948); *Eaton* v. *Schmahl*, 140 Minn. 219, 167 N.W. 481 (1918); *Chandler* v. *Howell*, 104 Wash. 99, 175 P. 569 (1918); *Ekwall* v. *Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934); *O'Sullivan* v. *Swanson*, 127 Neb. 806, 257 N.W. 255 (1934); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S. 2d 758, 759 (1940); *Sundfor* v. *Thorson*, 72 N. Dak. 246, 6 N.W. 2d 89, 90 (1942); *Watson* v. *Cobb*, 2 Kan. 32, 58 (1863); *Wettengel* v. *Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504 (1946); *Graham* v. *Hall*, 73 N.D. 428, 15 N.W. 2d 736, 740-41 (1944); *Chenoweth* v. *Acton*, 31 Mont. 37, 77 P. 299, 302 (1904); *Chambers* v. *Terry*, 40 Cal. App. 2d 153, 104 P. 2d 663, 666 (1940); *Dickson* v. *Strickland*, 114 Tex. 176, 265 S.W. 1012, 1015 (1924); *Broughton* v. *Pursifull*, 245 Ky. 137, 53 S.W. 2d 200, 203 (1932); *Mississippi County* v. *Green*, 200 Ark. 204, 138 S.W. 2d 377, 379 (1940); *Kivett* v. *Mason*, 185 Tenn. 558, 206 S.W. 2d 789, 792 (1947); *Wallace* v. *Superior Court*, 141 Cal. App. 2d 771, 298 P.2d 69 (1956).

Harmon v. *Forsennius,* 380 U.S. 528 (1965). The reason the right to exercise the franchise in a "free and unimpaired manner", this Court has taught, "is a fundamental matter in a free and democratic society" is because it is "preservative of other basic civil and political rights". *Reynolds* v. *Sims,* at page 562. [52]

This understanding of the true significance of the right to elect freely a representative of one's own choice has led the Court to restate in fundamental terms the reasons of policy underlying the original Philadelphia Convention decision that the Legislature is to be without power to disregard, alter or add to the qualifications for membership in either House. In *Reynolds,* the Chief Justice has placed the postulate considerations of a democratic society which govern the grave constitutional issues raised in this Petition in these forceful words:

> "As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legis-

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[52] See, in this connection, *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526 (1964), (opinion of Mr. Justice Black for the Court): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined", at p. 535. See also *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966) (opinion of Mr. Justice Douglas): "Long ago in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights' ", at p. 667.

lators in a free and unimpaired fashion is a bedrock of our political system."

Reynolds v. *Sims supra,* at page 562.[53]

(vi) *The most important and persuasive precedents of the House and Senate have always acknowledged the constitutional limitations upon their own power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.*

With the exception of the extraordinary events of March 1st of this year, the House itself, as well as the Senate, has in its most important and persuasive cases time and again acknowledged the constitutional limitations upon their power to exclude duly elected representatives of the people

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[53] The same concepts were recently expressed by Mr. Justice Fortas, joined in by the Chief Justice and Mr. Justice Douglas in their opinion in *Fortson* v. *Morris,* — U.S. —, 87 S. Ct. 446 (1966): "A vote is not an object of art. It is the most sacred and most important institution of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, *results in effectuating the will of those citizens,* provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court.

In short we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws *from nullification except by the voters themselves. The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis* . . . 'the right to vote is too important in our free society to be stripped of judicial protection' by any other interpretation of our Constitution." 87 S. Ct. at p. 457. (emphasis added).

who meet all the constitutional qualifications for membership in either body.[54]

The first occasion on which the implications of Article I, Clause 2, and Article I, Clause 5 were fully debated in the House was in 1807, only twenty years after the Constitutional Convention. In the contested election case of *William McCreery,* Tenth Congress, 1807, 1 Hinds § 414, the House, after "'exhaustive debate,'' 1 Hinds p. 381, affirmed the mandate established at the Philadelphia Convention that the constitutional qualifications of age, citizenship and inhabitancy were the sole qualifications for membership in the House. Thus, the Chairman of the Committee on Elections placed in this manner the proposition later affirmed by the full House:

> "The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. That the State Legislatures cannot prescribe the qualifications of their own members is evident, it is believed from their respective constitutions; and that they are authorized to judge of the qualifications of their own members by their own constitutional rules only, and of the election of their own members by their respective election laws, must be admitted. Congress, by the Federal Constitution are not authorized to prescribe the qualifications of their own members,

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[54] In a handful of occasions, among the many times the question has been before the House, the constitutional limitations were ignored. In the case of *Brigham Roberts,* 56 Congr. 1899, 1 Hinds, Sect. 474, discussed *infra* at pp. 75-76, and the case of *Victor Berger,* 66 Congr., 58 Congr. Rec. (1919), discussed *infra* at pp. 77-78, the principles expressed in both cases, arising in a wave of national hysteria, were later repudiated by the House itself. See *Bond* v. *Floyd,* 251 F.S. 333 at 345 (opinion of Chief Judge Tuttle).

> but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and them only. These are the principles on which the Election Committee have made up their report, and upon which these resolution is founded." *Annals of Cong.*, Nov. 1807, p. 872.

The case arose on the question of whether the Representative-elect, though qualified according to the Federal Constitution to take a seat in Congress, should be denied that seat because he did not meet an additional requirement set for Congressmen by the Constitution of his state. In announcing its adherence to the constitutional mandate that the House could not refuse to seat a Member-elect who met all constitutional qualifications, the House acknowledged certain fundamental guidelines imposed upon it by the Constitution.

a) "The people had delegated no authority to the States or to the Congress to add to or diminish the qualifications prescribed by the Constitution." 1 Hinds at p. 382. See in particular Annals of Congress for the 10th Congress, pp. 872, 875, 887-88, 893, 895, 909, 910, 915-16.

b) "If they could do this [deviate from strict constitutional qualifications] any sort of dangerous qualifications might be established—of property, color, creed, or political professions." 1 Hinds at p. 382; Annals of Congress for the 10th Congress, pp. 873, 878, 895, 908-09, 913.

c) "The people had a natural right to make a choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature." 1 Hinds at p. 382, Annals of Congress for the 10th Congress, pp. 873-74, 875, 895. Accordingly, the House voted to seat the Congressman-elect after finding that he possessed the constitutional qualifications, holding that these qualifications are exclusive and the sole requirements for taking

the seat. Annals of Congress for the 10th Congress, pp. 878, 910, 911-12, 914, 918.

These principles, responsive to the constitutional mandate established only twenty years previously, reflected an understanding on the part of the members of the House in the first days of the Republic that what is here involved is the most fundamental principle of a democratic society—the right of the people to freely elect their own representatives. Thus Representative Desha expressed the deep-felt sentiments of the House underlying its actions in this precedent-making decision when he said:

> "On this occasion, the question was whether the Federal Constitution, and whether any State Legislature, or any other power of legislation, could add qualifications to any member of that House . . . every contraction of qualifications for Representatives was an abridgment of the liberty of the citizens. The power of adding other qualifications than those fixed by the Constitution would . . . be a breach of the right of suffrage. . . . We are placed here as guardians of the people's rights and privileges. Do not then let us hold out with one hand a fair appearance of zeal for the rights of the people and the public good, and at the same time take every advantage imaginable with the other, by curtailing their Constitutional privileges, and, instead of allowing the people a complete range to select a man worthy of representing them in Congress, confine them to certain situations. I dislike this kind of political hypocrisy. I dislike anything that looks like sporting with the rights of the people, with the rights of those that I consider the firm supporters of the republican fabric." [55]

This case in the House, arising in the earliest days of the Republic, has of course great importance, for, as Chief

[55] Annals of Congress for the 10th Congress.

Justice Taft said in *Myers* v. *United States,* 272 U.S. 52, 175 (1926), "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions."

The fact that the Congress "acquiesced in" this acceptance of the constitutional mandate "for a long term of years," see *Myers* v. *United States, supra,* is evidenced in the contested election cases of *Turney* v. *Marshall* and *Fouke* v. *Trumbull* in the 34th Congress, 1856, 1 Hinds, p. 384. In these cases the House reaffirmed after full debate the principles of the earlier decisions recognizing that the Constitution requires the seating of Congressmen-elect upon a showing of the presence of the constitutional qualifications for membership in the House. The report of the Election Committee, presented by Representative John A. Bingham (R. Ohio),[56] re-emphasized these understandings.

> a) "The qualifications of a Representative, under the Constitution, are that he shall have attained the age of 25 years, shall have been seven years a citizen of the United States, and when elected, an inhabitant of the state in which he shall be chosen. It is a fair presumption that when the Constitution prescribes these qualifications as necessary to a Representative in Congress it was meant to exclude all others." 1 Hinds, at p. 385.
>
> b) "By the Constitution, the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever." 1 Hinds, at p. 386.

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[56] Rep. John A. Bingham has been recognized as one of the most eminent constitutional lawyers of the House, and is well known as one of the primary Framers of the XIVth Amendment to the Constitution.

c) "To admit such a power [to deviate from the sole constitutional qualifications] . . . is to prevent altogether the choice of a Representative by the people." 1 Hinds, at p. 385.

The Committee concluded that a failure to seat a Congressman-elect who met all the constitutional qualifications for membership in the House would be "absolutely subversive of the rights of the people under that Constitution." 1 Hinds, at p. 386.[57]

These controlling concepts were once again forcefully restated by the Senate in the *Case of Benjamin Stark,* 37th Congress (1862), 1 Hinds, § 433. The Senator-elect was challenged on the ground that he had engaged in conduct "very unbecoming and very reprehensible in a loyal citizen." Cong. Globe, 1862, p. 861. In opening the debate for the majority of the Election Committee, Senator Harris placed the fundamental constitutional propositions which limit the power of the Senate:

> "The question submitted to the committee was whether or not evidence of this description could be allowed to prevail against his *prima facie* right to take his seat as Senator. The committee were of opinion that they could not. The Constitution declares what shall be the qualifications of a Senator. They are in respect to his citizenship; and the committee were of opinion that the Senate were limited

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[57] Cf. Resolution of House of Commons expunging resolutions of exclusion of John Wilkes, *supra,* at p. 23. The decision of the House in *Turney* v. *Marshall* was adhered to by the Senate in a parallel situation in the *Case of Trumbull,* 34th Congress, 1 Hinds, § 416, p. 387, in which the Senate held that constitutional qualifications could not be added to. In the later case of *Wood* v. *Peters,* 48th Congress (1884), 1 Hinds, § 417, p. 387, the House specifically reaffirmed the principles set forth in Representative Bingham's report for the Election Committee in *Turney* v. *Marshall,* finding that *"the authorities cited place the question involved in this case beyond the realm of doubt."* 1 Hinds, at p. 389 (emphasis added).

to the question, first, whether or not the person claiming the seat and presenting his credentials produced the requisite evidence of his election or appointment; and second, whether there was any question as to his constitutional qualifications."

Certain Senators eloquently urged that the dignity of the Senate required an investigation into the "unbecoming" and "reprehensible" prior conduct of the Senator-elect. Senator Harris responded for the Election Committee in words which reflected an understanding of the underlying principles first enunciated in the Constitutional Convention:

> "[It is suggested that] when a man comes to take his seat here, the Senate can inquire into his former life, see what his conduct has been, whether he has been guilty of crime or not; and if, in the judgment of the Senate, he has been guilty of crime or misconduct, it can deny him the seat to which he was elected by the proper constituency in order to punish him for his offense! Now, I do not understand that it is competent for the Senate, and I think they step aside from their only jurisdiction when they attempt to punish a man for his crime or misbehavior antecedent to his election. If this were so the Constitution ought to be amended so as to read, that the Legislature of a State, or the Governor of a State, in a certain contingency, shall elect or appoint a Senator, subject to the advice and consent of the Senate. The Senate would then be the ultimate judge whether or not the man ought to have a seat there, and it would be competent for the Senate upon any caprice or any view it might take of the capacity, moral, or intellectual, or political, of a man, to reject him and prevent his taking a seat. Sir, I do not so understand the Constitution. I understand the Senate is the judge of the election of a Senator, of the sufficiency and genuineness of the returns furnished, and the evidence of that election; and also of the constitutional qualifications of the

> individual to hold a seat in the Senate. *Beyond that, I apprehend the Senate have no power at all.*" [58] (Emphasis added.)

Upon this presentation of the governing concepts by the Election Committee, the Senate seated the Senator-elect, finding that he had the requisite sole constitutional qualifications. As in the earliest days of the Republic, the Senate once again accepted the concept that the limitation of its power to judge the qualifications of a member-elect to the constitutional qualifications alone was a fundamental protection for the people themselves. For, as Senator McDougall said on the floor of the Senate, "If the Senator from Oregon is denied a seat, it is a denial to Oregon of her constitutional right of representation."

The principles restated by the Senate in the *Case of Benjamin Stark* were shortly thereafter put to a severe test and wholly reaffirmed by the House in the case of *Grafton* v. *Conner*, in the 41st Congress (1870). Representative-elect Conner was charged with having brutally and

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[58] The debate in the Senate reaffirming the original decisions made in Philadelphia once again reflected fundamental considerations. As Senator McDougall stated, the refusal to seat a constitutionally qualified Senator-elect may be

> "one of the heaviest blows that can be struck at the foundation of our republican institutions. This is no common matter of business. It is an assertion of the right of a majority of this body to refuse entrance here to a person clothed with all the miniments of right by a sovereign State, and against whom is alleged no constitutional or legal disqualification. Whose right is to that he should be here? The right of the people of the State of Oregon—their Constitution and the laws of Congress under it, which alone bind them in this matter."

And as Senator Browning declared, such a practice

> "is one that is capable of immense abuse, immense wrong; and one which it is within the range of possible things might at some time or other be used for the worst purposes of tyranny. I am not willing to aid in establishing such a precedent."

severely beaten Negro soldiers under his command while in the Armed Forces and, while on trial by court martial on those charges, having bribed witnesses and suborned evidence and perjured himself before the court. Cong. Globe, Part 3, 41st Cong., 2nd Sess. 1869-70, pp. 2322-23. The debate on the floor of the House once again reflected the recognition that the House was bound by the Constitution itself to seat a member-elect who possessed the constitutional qualifications for membership in the House. Thus, Representative Orth stated:

> "Turn to the Constitution and see what it prescribes in reference to the qualifications of a member of this House. Mr. Conner has the requisite age. He has the requisite residence. He has the requisite certificate of his election from the proper authorities. The Committee of Elections has so reported, and that settles the prima facie case."

Representative Daws restated the constitutional limitations which govern an investigation by the House under Article I, Clause 5 into the right of a member-elect to be sworn:

> "Mr. Speaker, the Committee of Elections of the last Congress had occasion to consider how far it was within their province to consider questions at the threshold, in limine, before a member applying for his seat was sworn in. It arose first on charges brought against members touching their loyalty. The conclusion to which the committee came after very careful examination of this question, and in which they were sustained by the House over and over again, was this: That as to any question which touched the constitutional qualification of a gentleman claiming a seat it was proper that question should be raised at the threshold before he was sworn in. And it was decided by the last House, when any member, upon his responsibility as a member, made any charge against any claimant to a seat that touched his constitutional qualification, the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the

Committee of Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. *But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a member, and never did this House decide that we had the right to go one inch beyond that question.*" (Emphasis added.)

The statements of Representative Schenck on the floor of the House powerfully reflect the fundamental concepts of representative democracy which underlie the limitations the Constitution places upon the House.:

"I do not understand that it is alleged that any of these constitutional qualifications are not possessed by the gentleman who now seeks to be admitted to a seat upon this floor. What then? It is proposed that as he has once been tried by a court-martial, or a court of inquiry, the result of which is alleged to be unsatisfactory, because of some criminal conduct on his part, because of his suborning witnesses, it is proposed that we shall try the case over again, and ascertain whether he is a person of proper moral character to be admitted to a seat upon this floor.

"Sir, break down the rule of the Constitution, once say that you can go outside of the qualifications prescribed by the Constitution as sufficient to entitle a person to membership, and where are we to stop? Every man who presents himself here as a member-elect will be liable to have alleged against him some crime, some offense against the laws, and thereupon a trial must be instituted. Every man presenting himself here to be sworn in will, by the force of partisan malignity upon the one side or the other, probably have something of that kind alleged against him in order to have him prevented from taking his seat. And while that may not occur now when the House is so unequally divided between parties, there may come a time when the House will be more equally divided, and this course may be resorted to in order

to prevent there being added any more to the members of this House of one party or the other.

* * *

"What I wish to say is that we must leave something to the people; and when they have settled all these questions by electing and sending certain persons here, there remains with us nothing but to accept their work."

The questions posed to the House in this debate which resulted in the seating of the Member-elect penetrate to the essence of the constitutional question involved in the present Petition. The question Representative Schenck asked the House in 1870 is the question Mr. Madison placed to the Founding Convention in 1787. Once the House "breaks down the rule of the Constitution", where is it to stop? This is the ultimate inquiry which goes to the very heart of representative democracy. As the House itself recognized in 1870, "there may come a time when the House will be more equally divided, and this course may be resorted to in order to prevent there being added any more to the members of this House of one party or the other." And when this time comes, the very foundations of democratic government are placed in peril and Madison's warning in 1787 that "a Republic may be converted into an aristocracy or oligarchy" may be suddenly real.

Until the unusual events of this March in which the House majority brushed aside the constitutional advice of its own Select Committee and the respected Chairman of its own Judiciary Committee [59] the House has in its most

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[59] The Honorable Emanuel Celler, Chairman of the Judiciary Committee of the House, placed the constitutional issue in these terms:

"Some may demand exclusion—ouster at the threshold by majority vote. The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. POWELL satisfies all three. The House cannot add to these

(Footnote continued on next page)

recent cases revealed a continued acceptance of the fundamental limitations which the Constitution places upon its

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qualifications. If so it could add, for example, a religious test or conceivably deny seats to a minority by mere majority vote.

"Madison and Hamilton were aware of the danger of permitting the House to regulate qualifications. They therefore said the Constitution unalterably fixes and defines qualifications. Madison said that to allow the Congress such power would be improper and dangerous." Cong. Rec. Mar. 1, 1967, H. 1926.

See further the following revealing exchange between Chairman Celler and Representative Cormon:

"Mr. Celler: On the matter of exclusion, as I understand it—and I should like to get the gentleman's view—the Constitution provides that there shall be three qualifications—namely, age, citizenship, and inhabitancy—and that the Congress cannot add to those qualifications.

"That has been borne out by the articles of Madison and Hamilton in the Federalist, and borne out by the decision in the Bond case recently decided by the Supreme Court. Am I correct in that?

"Mr. Corman: The gentleman is correct. In our review we noted that at the time of the debate on this provision by the Convention there was consideration as to whether or not the qualification of property ownership ought to be included. The Founding Fathers were very explicit that the sole qualifications should be the three specified in the Constitution. They rejected additions at that time.

"Mr. Celler: These qualifications are set forth explicitly in the Constitution. And if Congress had a right to add to those qualifications then conceivably Congress could prescribe a qualification based, for example, on religion. Am I correct in that?

"Mr. Corman: Yes, sir; the chairman is correct.

"Mr. Celler: There could conceivably be a situation arise in which the majority Members of the Congress could by some device exclude the entire minority membership. Am I correct in that?

"Mr. Corman: Yes, sir.

"Mr. Celler: And that led Hamilton to agree with Madison that:

" 'The qualifications of the person who may choose or be chosen are defined and fixed in the Constitution; and are unalterable by the Legislature.' (The Federalist, No. 60.)" Cong. Rec. Mar. 1, 1967, H. 1927.

power to reject duly elected representatives of the people who meet the constitutional qualifications for membership.

The case of *Francis N. Shoemaker,* in the 73rd Congress (1933), contains the latest full discussions on this question in the House of Representatives prior to the debates of this March. In the Shoemaker debates the House once again reaffirmed its recognition of the fundamental constitutional limitations upon its power here involved.

Representative-elect Shoemaker had been convicted of a crime in Minnesota and had been sentenced to a term in the penitentiary. The House, in seating the Congressman-elect, re-emphasized its basic acceptance of the constitutional mandate that the power of the House lies solely in determining the presence of the qualifications for membership set forth in the Constitution. Finding these qualifications present, and finding that the conviction of the Representative-elect had not deprived him of his "citizenship", the House voted to seat him. 77 Cong. Rec. 131, 132, 133, 134, 136, 139 (1933).

The debate on the floor of the House which resulted in the seating of the Member-elect reflects the continued acceptance of the constitutional limitations first discussed and acknowledged on the floor in the early days of the Republic. The strict constitutional limits upon the power of the House were succinctly placed by Representative Lemke, who led the successful fight for the seating of the Member-elect.

> "Mr. Speaker, the question before the House is whether Mr. F. H. Shoemaker is entitled to a seat in this House or whether he is disqualified.
>
> "I make the statement without fear of contradiction that he is not disqualified but is qualified to sit here as a Member of this House under the Constitution of the United States of America and under the rules and regulations of this House.
>
> "In the first place, the qualifications for a Congressman are the following:

> No person shall be a Representative who shall not have attained to the age of 25 years, had been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.
>
> "This is the qualification required by the Constitution of the United States."

Representative McKeown sharply synthesized the recognition of the House of the limitations placed upon its power by the Constitution in these words:

> "The Constitution says that there are three qualifications for a Member of the House. Neither the State Legislature . . . nor the Congress of the United States can change these qualifications. They are written into the Constitution by the great fathers of the Republic, and they cannot be changed by law."

The most recent and exhaustive discussion reflecting the Legislative branch's own recognition of the limitations placed by the Constitution upon its power to exclude duly elected representatives of the people is to be found in the exhaustive Senate debate in the case of *William Langer of North Dakota* in the 77th Congress (1942), S. Journ. 77th Congr. 1st Sess. p. 8 *et seq.*, 2nd Sess. p. 3 *et seq.* The Senator-elect was challenged at the taking of the oath. The "charges against Langer were numerous and chiefly involved moral turpitude, embracing kickbacks, conversion of proceeds of legal settlements, acceptance of a bribe in leasing government property, and premature payments on contracts of advertising." *Senate Election, Expulsion & Censure Cases,* p. 141. The Senate after full debate seated the Senator-elect.

The debate, which resulted in the seating of the Senator-elect, reflected a fundamental reaffirmation of the Constitutional limitations upon the power of the Legislature recognized from the first days of the Republic. The debate reaffirmed the recognition that the constitutional power of the Legislature in Article One, Section Five to "judge" the qualifications of its members is restricted to those qualifications set forth in the Constitution itself. Senator

Murdock, who led the successful fight for the seating of Senator Langer, placed the question in words which reflect the basic philosophy underlying the constitutional issues here involved.

> "What do we judge? A man comes here and presents his credentials and claims that he has the constitutional qualifications to be a Senator. As judges of that fact, we look at his credentials; we consider his constitutional qualifications. Where do we find them stated? We find them set out in the Constitution. I believe it was contemplated by the framers of the Constitution that when a man came here with credentials from his State, and claimed to have the constitutional qualifications, the matter could be judged by the Senate in not to exceed a week or 2 weeks' time; but when the word 'judge' is construed to mean the power to add qualifications, about which the State does not know, about which the Senate does not know, then, of course, there is brought about the type of farce which resulted in taking 4 years to determine that Reed Smoot was entitled to sit here as a United States Senator, and the type of farce which has resulted in Senator LANGER'S right to a seat being held in abeyance for more than a year, the committee searching his life almost from childhood up to the present time.
>
> "Oh, did the men who wrote the Constitution ever contemplate that such a thing as that would happen? *In framing the Constitution they had the right to decide what tribunal should be the judge of the morals and the intellectual qualifications of the men sent here, and they decided that the people of the sovereign States should have that power, restricted only by the very definite but simple qualifications enunciated in the Constitution itself.*" Cong. Rec., p. 1947 (emphasis added).

Senator Murdock further carefully defined the meaning of Article One, Section Five so as to exclude any possibility that this Clause justified considerations beyond the express constitutional qualifications.

> "Mr. Murdock: I desire to read again the provision—

'Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members. . . .'

To my mind, the word 'judge' means to look at the qualifications contained in the Constitution. That is what the verb 'judge' means: To judge of something in existence—law or facts—and to apply the law to the facts. To extend the definition of the word 'judge' to mean that we can superadd to these qualifications, in my opinion, is a misconstruction of the word itself." Cong. Rec. 1942, p. 2475.[60]

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[60] An interesting exchange between Senator Murdock and Senator Overton further amplifies this construction of the impact of the word "judge":

"Mr. Overton: I understand the position taken by the able Senator is that section 5, article I, of the Constitution, which vests in each House the right to judge of elections, returns, and qualifications of its own Members does not vest any authority in the Senate or in the House to add to the qualifications prescribed by the Constitution, and that the word 'judge' is not to be interpreted as the word 'prescribed' would be interpreted, but means simply that the Senate, in this case, for example, sits as a judge and, as a judge, applies certain well-known provisions of the Constitution and of statutory law to the facts of the case.

"Mr. Murdock: That is my position.

"Mr. Overton: I wish to add one contribution to the argument made by the able Senator—that is, what the Supreme Court of the United States had to say with reference to section 5 of article I, which gives each House the power to judge of the qualifications of its Members. The Supreme Court of the United States, speaking through Mr. Justice Pitney, said:

'The power to judge of the elections and qualifications of its Members, inhering in each House by virtue of section 5 of article I, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine, upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion.' [Mr. Overton appears to be referring to Mr. Justice Pitney concurring in *Newberry* v. *United States*, 256 U. S. at 484.]

I think that fully supports the contention made by the able Senator from Utah, and I think it correctly interpretes the word 'judge' as used in section 5 of article I of the Constitution."

The following critical exchange between Senator Lucas and Senator Murdock illustrates the original meaning of Article One, Section Five, see Point I, (i), *supra,* now once again reaffirmed by the Legislature itself:

> "Mr. Lucas: The Senator referred to article I, section 5. What does he think the framers of the Constitution meant when they gave to each House the power to determine or to judge the qualifications, and so forth, of its own Members.
>
> "Mr. Murdock: I construe the term 'judge' to mean what it is held to mean in its common, ordinary usage. My understanding of the definition of the word 'judge' as a verb is this: When we judge of a thing it is supposed that the rules are laid out; the law is there for us to look at and to apply to the facts.
>
> "But whoever heard the word 'judge' used as meaning the power to add to what already is the law?"—Cong. Rec. 1947, p. 2479

A recognition of the fundamental wisdom of the refusal of the Founders to permit the Legislature to exclude duly elected members upon its own conception of their "morality" or "unfitness" is reflected throughout the Senate proceedings. Thus, the report ultimately adhered to by the Senate in vindicating the Senator-elect's right to a seat states in words which apply with prophetic insight to the present petition:

> "The power to determine fitness was reserved to the electorate as the best judges of the social, intellectual, and moral qualifications of those whom they saw fit to select as their representatives. The makers of the Constitution doubtless balanced the possibility of an unwise choice of the electorate against the possibility that an agency of government, given unrestricted discretion, might, under the masquerade of morality, decide from motives of partisanship, bigotry, or fanaticism."—Cong. Rec. 1947, 2486

Senator Murdock further explored the basic reasons why the Constitution prohibits any inquiries by the Legislature other than those into the presence of constitutional qualifications:

> "Mr. Murdock: I cannot believe that the framers of our Constitution contemplated any such result.
>
> "Now, let us take a further example. If we have the right to go into the moral character or the intellectual ability of a Senator-elect, then do we not have the corresponding duty to do it? Think that over. What would be the result? Every Senator-elect, then, would have his enemies in his own State; we have a right, under the contention of the majority, to go on these fishing trips; if we have the right, we have the duty; and if we have the right and the duty, then what do we become? We become the triers of the moral and the intellectual life of every Senator-elect from the cradle to the time of his election. Who is going to concede that? Who is going to contend for that?"—Cong. Rec. 1947, p. 2489 [61]

The critical importance to the preservation of the "bedrock" of our political system—the principle of representative democracy—was placed in clear and eloquent terms on the floor of the Senate:

> "Mr. Milliken: I suggest to the Senator that a representative form of government is the heart of a republican form of government, and when the Senate

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[61] An exchange on the floor between Senator Murdock and Senator Pepper further illustrates the principle underlying the *Langer* case:

> "Mr. Murdock: . . . I take the position that the Senate has no right under the Constitution to go into the morals of the Senator-elect.
>
> "Mr. Pepper: I see. The Senator construes section 5, or article I, which gives each House the power to judge of the qualifications of its Members, to be limited to the things prescribed in the Constitution?
>
> "Mr. Murdock: Yes.
>
> "Mr. Pepper: I thank the Senator.
>
> "Mr. Murdock: The Senator from Florida states the matter very clearly."

undertakes to eliminate a newly elected Senator that, instead of guaranteeing a republican form of government, it is destroying a republic form of government.

"Mr. Murdock: I think the Senator is exactly correct, and I thank him for his contribution. To say to a sovereign State that by reason of its inherent power the Senate reserves the right to pass on the morals and the intellectual qualifications of the men who are sent here is disruptive of a republican form of government."—Cong. Rec. 1947, p. 2481

In concluding his arguments which convinced the Senate to seat the challenged Senator-elect, Senator Murdock restated the persuasive considerations which we have seen underlay the original conclusion of the Founding Fathers that the Legislature has no constitutional power to refuse to seat a duly elected member who meets all constitutional qualifications. Senator Murdock reminded the Senate:

"Is it to be surmised that Madison, who was one member of a committee of three—its members were Madison, Hamilton, and Gouverneur Morris—would be so emphatic with reference to this particular point, and, after retiring in order to put it into immaculate form, would bring it back with the substance changed? No, Mr. President; to make such an assertion is to question the integrity of Madison, a man who fought not for phraseology, not for some technicality, but for substance.[62] The substance was

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[62] Senator Murdock is here referring to an argument similar to the one Defendants rely primarily on in their brief submitted to the District Court, consisting of a long discredited theory that because the wording of Article I, Section 2, Clause 2 was framed in the negative, that clause states, not exclusive qualifications for membership but rather minimal disqualifications. This fallacious reasoning has been fully refuted by Professor Charles Warren and rather than discuss it at any length ourselves, perhaps it would be more useful to the Court merely to set forth Professor Warren's carefully formulated rejection of this reasoning:

"An argument to the contrary has been made based on the fact that the qualifications, as reported by the Committee of

(Footnote continued on next page)

what? That the qualifications of Members of Congress should be specified in the Constitution itself, not left to the discretion of the Congress. Why did

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Detail on August 6, were expressed affirmatively, thus: 'Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be at the time of his election a resident of the State in which he shall be chosen' (and similarly as to Senators); whereas, as finally drafted by the Committee of Style on September 12, they were expressed negatively as follows: 'No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen' (and similarly as to Senators). The argument is made that this change, while giving to each House unlimited power to establish qualifications, simply imposed an obligation on them not to admit any persons having the specified *disqualifications*.

"It is to be noted, however, that the Committee of Style had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief, after September 12, that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10. That there was no difference in legal effect between a qualification expressed affirmatively and one expressed negatively may be seen from the fact that the Constitution of Massachusetts of 1780 contained affirmative qualifications for Senators as follows: 'Every member of the House of Representatives . . . for one year at least next preceding his election shall have been an inhabitant of and have been seized in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any taxable estate of two hundred pounds.' 'No person shall be capable of being elected as a Senator who is not seized of his own right of a freehold, within the commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or both to the amount of the same sum, and who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and at the time of his election he shall be an inhabitant in the district for which he shall be chosen.' And in each case the Massachu-

> he take such a position? *Because he knew that the fundamental cornerstone of the government of a republic is the people's right to freedom of choice of those who represent them: and Madison knew that the qualifications should be contained in the Constitution and not left to the whim and caprice of the legislature."* (emphasis added)

The sweeping reaffirmance of the recognition by the Legislature of the constitutional limitations upon its power to exclude duly elected representatives of the people who meet all constitutional qualifications for membership reflected in the *Langer* case, rested in large measure upon an historic report of the Judiciary Committee of the House of Representatives for the 42nd Congress. This report, issued and approved in the cases of *Ames* and *Brooks,* 42nd Congr., 2 Hinds, p. 866 (1872), was read in full to the Senate in the *Langer* debate by Senators Murdock and Barkley. It states in the most powerful terms the fundamental precepts of our system of government which required the conclusion of the Philadelphia Convention that the Legislature was to have no constitutional power to refuse to seat duly elected representatives of the people who met the qualifications for office set forth in the Constitution itself:

> "... The answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such con-

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setts Constitution termed them 'qualifications' and empowered the House and Senate to judge them, as follows: 'The Senate shall be the final judge of the elections, return and qualifications of their own members as pointed out in the Constitution.' 'The House shall be the final judge of the elections, returns and qualifications of their own members as pointed out in the Constitution.'

'So, too, in the State Constitutions of New Hampshire of 1784, Pennsylvania of 1776, and South Carolina of 1778, the qualifications of members of the Legislature are expressed in the negative phraseology thus: 'No person shall be capable of being elected'—'no person shall be eligible to sit', etc."

siderations of 'justice and sound policy' as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the Member. Every intendment of our form of government would seem to point to that. This is a government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives, whom they are to choose, not anybody else to choose for them; and we, therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that 'The House of Representatives shall be composed of Members chosen every second year by the people of the States' not by representatives chosen for them at the will and caprice of Members of Congress from other States according to the notions of the 'necessities of self-preservation and self-purification.'

* * *

"Your committees are further emboldened to take this view of this very important constitutional question because they find that in the same sanction it is provided what shall be the qualifications of a Representative of the people, so chosen by the people themselves. On this it is solemnly enacted, unchanged during the life of the Nation, that 'no person shall be a representative who shall not have attained the age of 25 years, and been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

"Your committees believe that there is no man or body of men who can add or take away one jot or tittle of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such Members as are left after the process of 'purgation and purification' shall have been exercised for the public safety, such as may be 'deemed necessary' by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated to be confided in any

> body of men; and, therefore, most wisely retained in the people themselves, by the express words of the Constitution."

This report of the House Judiciary Committee of the 42nd Congress in incisive terms states the very essence of the historic constitutional question raised in this petition. The selection of the representatives of the people to the houses of the Legislature is not a matter which "has in any measure been committed by the Constitution to the legislative branch of the National Government. *Cf. Baker* v. *Carr,* 369 U.S. 194, 211. On the contrary, as the Report of the Judiciary Committee acknowledges, this power has, by the Constitution, been assigned to "another and higher tribunal," the "people themselves," subject only to such qualifications as the "people themselves" have established in the fundamental law of the land—the Constitution itself. This flows from the basic postulate upon which this experiment in representative government rests—that "this is a government of the people, which assumes that they are the best judges of the social, intellectual and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them." When the Legislature ignores the constitutional qualifications for membership in the House established by the people and intrudes into the power vested exclusively by the Constitution in the sovereign people to select freely their own representatives, the House has dangerously invaded the powers reserved by the Constitution, and by the philosophy of government it rests upon, to the people themselves.[63]

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[63] The House has in the past ignored the constitutional limits on its power only on rare occasions and under intense partisan pressure and public hysteria. These isolated cases have been seriously criticized by the House itself and have been subsequently overruled and discarded.

The case of *Brigham Roberts* in the 56th Congress, 1899, 1 Hinds, § 474, involved a member-elect from Utah who was barred from his

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B. The punishment of exclusion from membership in the House for the 90th Congress inflicted upon the Petitioner violates Article One, Section 9, Clause 3, providing that "No Bill of Attainder or *ex post facto* law shall be passed."

H. Res. 278, which imposes the severe punishment of exclusion from the House of a duly elected Representative who meets all constitutional qualifications for membership,

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seat on the ground that he was a polygamist in accord with the Mormon faith and had been convicted of violating the federal Edmonds Act prohibiting polygamy. The House, responding to a wave of anti-Mormon feeling throughout the country, barred Roberts despite a strong minority report which reasserted the constitutional principles previously adhered to by the House. Only a few years later the Senate sharply repudiated the *Roberts* action, seating, in the case of *Reed Smoot of Utah,* in the 58th Congress, 1903, 1 Hinds, §§ 481-84, a Senator-elect despite his adherence to the Mormon faith. The Senate forcefully reasserted the controlling constitutional limitation that the sole question before the legislature is the presence of the constitutional qualifications. The Senator who led the fight to exclude Senator Smoot, Senator Taylor, had been the Representative in the House who had engineered four years before the efforts to bar Mormon Representative Roberts. The positions advanced by Senator Taylor in justification of the *Roberts* exclusion were sharply and successfully refuted in the following argument of Senator Knox:

> "There is no question as to Senator Smoot possessing the qualifications prescribed by the Constitution, and therefore we can not deprive him of his seat by a majority vote. He was at the time of his election over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, 'These are not enough; we require other qualifications,' or to say that we can not trust the judgment of States in the selection of Senators, and we therefore insist upon the right to disapprove them for any reason.
>
> "This claim of the right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the States have notice at the time of selecting their Senators, but it is said to be absolute in each case as it arises, uncontrolled by any canon or theory whatever.

is a classic Bill of Attainder prohibited by Article One, Section 9, Clause 3 of the Constitution. It is "a legislative act which inflicts punishment without a judicial trial.

"Anyone who takes the trouble to examine the history of the clause of the Constitution as to the qualification of Senators must admit that it was the result of a compromise. The contention that the States should be the sole judges of the qualifications and character of their representatives in the Senate was acceded to with this limitation; a Senator must be 30 years of age, nine years a citizen of the United States, and an inhabitant of the State from which he is chosen. Subject to these limitations imposed by the Constitution, the States are left untrammeled in their right to choose their Senators. This constitutional provision secures a measure of maturity in counsel, and at least a presumption of interest in the welfare of the Nation and State."

The Senate ultimately determined that because Mr. Smoot possessed the constitutional qualifications he was entitled to his seat. And a subsequent move to expel Senator Smoot failed. See generally, 1 Hinds, § 478, pp. 550-57. Significantly, the House itself, in 1933, in the case of *Shoemaker, supra,* pointedly disregarded the *Roberts* case as binding precedent. Similarly, in the *Langer* case, *supra,* the Senate specifically approvingly followed the minority report in *Roberts.*

Following the Civil War, in a group of cases, the House barred members-elect who had participated in the Rebellion. See the cases of the *Kentucky Members* in the 40th Congress, 1867. However, it was pointed out in subsequent Congresses that the Congress itself recognized that this action was unconstitutional under Article I, finding it necessary to adopt Section 3 of the Fourteenth Amendment to sanction barring of members-elect on this additional ground of loyalty to the Confederacy. See the discussion in the *Langer* case, *supra,* Cong. Rec. 1942, March 16, p. 2484. See also 33 Virginia Law Review 332:

"Were the Senate able to impose qualifications as it saw fit, it would not have been necessary to amend the Constitution to achieve the above result," at p. 332.

The case of *Victor Berger* in the 66th Congress, 58 Cong. Rec. (1919) involved the refusal to seat a Congressman-elect who had been found guilty in World War I of violation of the Espionage Act. The House majority took the position that Berger had in effect committed "treason" which foreclosed his right to hold office under the United States pursuant to the congressional constitutional power

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Cummings v. *Missouri*, 4 Wall 277; *United States* v. *Lovett*, 328 U.S. 303 (1946); *United States* v. *Brown*, 381 U.S. 437 (1965). It represents, in the recent words of the Chief Justice, "the evil the framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups." *United States* v. *Brown*, *supra*, at p. 447.

1. There is not the slightest question that the House itself, the Select Committee which sat and presented recommendations, the House leadership which urged adoption of those recommendations, and the majority which rejected the recommendations as too lenient, regarded the actions, both proposed and as ultimately adopted, as *punishment* against the petitioner, Adam Clayton Powell, Jr.

The Chairman of the Select Committee, Mr. Celler of New York, placed in unequivocal terms the understanding of the Select Committee established by the House on January 10, that the objective assigned to them by the House itself was to sit in judgment on Congressman Powell and recommend appropriate punishment. Mr. Celler introduced the Report of the Select Committee in these words:

> "Mr. Speaker, the nine men appointed by the Speaker of the House were weighted with the heaviest responsibility that can be placed on any one

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to fix the penalty for treason. The majority House report further justified the exclusion of Berger under Section 3 of the Fourteenth Amendment, barring from the office of Representative anyone who has "given aid and comfort to the enemies" of the United States. This exclusion of Berger, a Socialist Congressman, at the height of the post-World War One anti-radical hysteria has been severely criticized. *Cf.* the opinion of Chief Judge Tuttle of the Fifth Circuit in *Bond* v. *Floyd*, 251 F. Supp. 333, 345. The Honorable Emanuel Celler, Chairman of the House Judiciary Committee, in the March 1st debate urged strongly the "repudiation" of such precedents as *Roberts* and *Berger*, which reflect the prejudices of prior eras. Chairman Celler urged that "this House should not resurrect a long discredited view of the Constitution and follow precedents bespeaking furor instead of fairness." Cong. Rec., March 1, 1967, H. 1945.

> group—to sit in judgment on their fellow man. What is asked of us when we judge one who had been a colleague for 22 years, who had been sent to Congress time and time and yet time again by his constituency? . . . *That we devise the structure of punishment that will be immediate, effective, certain and lasting.*" Cong. Rec. Mar. 1, H. 1919 (emphasis added).

Lest there be the slightest misconception of the Select Committee's view of its function, Mr. Celler went on further:

> "We had to face up to the necessity of meaningful punishment. The penalties imposed satisfy a stern sense of justice. . . . Exclusion or expulsion seemed deceptively simple. *Yet neither could bring into play the punishments herein devised,* keeping as well the recommendations of this committee within the boundaries of the Constitution and the precedents." Cong. Rec. *supra,* H. 1920 (emphasis added).

The majority leader of the House, Mr. Albert, then reaffirmed the understanding that the entire proceeding was designed and did indeed lead to *punishment* of the Petitioner:

> "It is true that what the committee has recommended adds up to stern punishment. But in its wisdom, the committee has decided that this is a just punishment." Cong. Rec. *supra,* H. 1920.

The irrefutable conclusion that what was in process was a "legislative act which inflicts punishment without judicial trial," *Cummings* v. *Missouri, supra,* is revealed in the exchange which then followed between Congressman Lennon and Chairman Celler:

> "Mr. Lennon: How can we say in conscience to the people of America, when this distinguished committee finds the gentleman from New York [Mr. Powell], both in his individual capacity as a Member and as chairman of a great committee, has willfully

and wrongfully and falsely misappropriated public funds to his own personal use—and the *gentleman knows that that is almost identical language that is sent to a grand jury on a bill of indictment for embezzlement. Just how can we vote to do it, my friend, in conscience and morality?*

"Mr. Celler: The report speaks for itself. The report went into all those facts to which the gentleman has adverted, and we came to the conclusion and stated *our findings in the report that we feel the censure and the punishment that we would mete out to Mr. Powell would be ample and sufficient.*" Congr. Rec. *supra*, H. 1921 (emphasis added.)

Representative Moore, the ranking Republican member of the Select Committee, likewise characterized the proceedings as punitive in nature, resulting in severe punishment.

". . . we feel we have come to this House with a resolution which *involves, in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in the history of our Nation.*" Cong. Rec. *supra*, H. 1921 (emphasis added).

Representative Corman, member of the Committee, described the nature of the Committee's own view of its purpose to assess the proper "legislative punishment" in clear words:

"It was the consensus of your committee that the conduct of Adam Clayton Powell warranted substantially more than censure, although it certainly warranted that too. We felt the punishment should do two things: first, it must be sufficiently severe to stand as a historic warning against future misconduct; second, it ought to retrieve for the American taxpayers, at least in substantial proportions, funds which were misappropriated; and third—and I think

of great importance—it ought to leave the door open for redemption."[64] Cong. Rec. *supra*, H. 1925.

Representative McGregor, another member of the Select Committee, likewise stated emphatically his understanding that the proceedings against Mr. Powell were punitive in character for the purpose of devising proper "legislative punishment." *United States* v. *Brown*, *supra*:

> "*Our recommended punishment is unprecedented in its severity. No one in the entire history of the U. S. Senate or House has been punished so harshly as we ask that Mr. Powell be punished.* And if Mr. Powell does not appear by March 13 to take his punishment, then under the terms of our recommended resolution his seat will be declared vacant.
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> * * *
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> "*We have recommended the exercise of our punishment power.*" Congr. Rec. *supra*, H. 1939 (emphasis added.)

The majority of the House, in rejecting the punishment recommended by the Select Committee, did so precisely

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[64] The dissenting views of Congressman Conyers of Michigan, fully recognizing the "punishment" aspect of the procedures and the constitutional consequences which flow from this, are interesting:

> "However, I cannot allow, in good conscience, of imposing a monetary fine and loss of seniority, be allowed to go unmentioned.
>
> "Because, Mr. Speaker, never before have we had to consider the imposition of a monetary assessment on an individual. Never before has any Member of the Congress been stripped of his seniority in the course of such proceedings.
>
> "The severe punishment of a loss of all seniority and imposition of a $40,000 fine is, first, violative of our system of Government; second, contrary to constitutional rights of Mr. Powell; third, subjects this matter to appeal in the Federal courts; and is, fourth, totally unprecedented." Cong. Rec. *supra*, H. 1929.

because they felt that the punishment proposed was not severe enough.

Mr. Curtis, who introduced the amendment which substituted exclusion for the punishment suggested by the Select Committee, made it most explicit that exclusion was punishment for the same offenses and based on the same findings which had been the foundation of the Select Committee's recommendations. This was brought out in response to a question by Mr. Edmondson of Oklahoma:

> "Mr. Edmondson: I would like to ask the gentleman if in his view the unanimous Committee findings that are set forth on pages 31 and 32, in which specific findings are made as to the wrongful misappropriation of public funds in amounts in the Committee Report totalling up to over $46,000—if these findings are in his view a basic and fundamental requirement to the action that is being taken here today?
>
> Mr. Curtis: I wish to thank the distinguished gentleman. Yes, indeed, they are. The basis of the discussion is that this motion of mine is a substitute, but it is based upon—and I emphasize again—the fine work that this Committee did and upon its findings. Incidentally there has been little or no mention about this, but there is also a finding of forgery, which disturbs me very much." Cong. Rec. *supra,* H. 1946.

Mr. O'Neal of Georgia, another supporter of the majority imposition of the severer penalty of exclusion, commented:

> "And let us not be confused by arguments that the punishment suggested by the committee is sufficient for his wrongdoing. My background includes 23 years as a prosecuting attorney in the courts of my home State, and such arguments are clearly foreign to my concept of American jurisprudence." Cong. Rec. *supra,* H. 1948.

Still another supporter of the exclusion action, Mr. Dowdy, explained his decision on the basis that exclusion was the only proper penalty for the "criminal conduct" the Petitioner was charged with and had been found "guilty" of:

> "Mr. Speaker, I support the resolution that the Member-elect from the 18th District of New York, Adam Clayton Powell, be excluded from this Congress, and that the seat be declared vacant. I cannot agree with the recommendation of the select committee that he be seated and censured. *If Powell is guilty of the criminal conduct with which he is charged, and I believe he is, and it was so found by the select committee, he ought not to be seated in the U.S. Congress.* If he is not guilty, he would deserve no censure. There is no in between in a case like this. On the proof and debate we have heard here, this resolution to deny the seat demands an 'aye' vote, and I so urge." Cong. Rec. *supra,* H. 1948. (Emphasis added.)

Mr. Broyhill of Virginia spoke in terms which expressed in the frankest way the views of the majority that the action of exclusion was specifically designed to be "legislative punishment."

> "Today we are asked to determine what penalty shall be imposed upon one of our own. We have chosen nine of our esteemed colleagues to serve as a select committee to advise us, and they have reported to us.
>
> • • •
>
> "The special committee now recommends that we seat Mr. Powell, censure him, strip him of his seniority, and require him to pay $40,000 through deductions from his congressional salary to offset liability to the U.S. Government.
>
> • • •
>
> "Mr. Speaker, if a member of the President's Cabinet were ever to be found guilty of having wrongfully and willfully appropriated some $44,000

of public funds for his own use, and made false certifications as to expenditures, would the Members of this House allow the President to punish that man by requiring him to pay back the money misappropriated and by demoting him to a lower Cabinet rank? I think we all know the answer. It is a resounding 'No.'

"If Mr. Powell is guilty of the offenses as our special committee has found, a vote to seat him would be a vote to seat right along beside him every charge of corruption against the Congress of the United States. His guilt, abuses, and illegal actions will taint all of us so long as he remains a Member of Congress. It is inconceivable that we should allow this man to be seated." Cong. Rec. *supra*, H. 1947.

The truly extraordinary nature of the proceedings against the Petitioner was that the entire House, its Select Committee, its leadership and the majority which took control at the conclusion of the debates openly and frankly regarded the proceedings as a means of imposing "legislative punishment—against specifically designated persons." *United States* v. *Brown*, at p. 447. The only controversy between the majority and the minority was as to the "form or severity" of the "legislative punishment". *United States* v. *Brown*, at p. 447. The resolution of exclusion was therefore a classic Bill of Attainder prohibited by the Constitution. *Cummings* v. *Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333; *United States* v. *Lovett*, 328 U.S. 303; *United States* v. *Brown*, 381 U.S. 450.

2. The constitutional prohibition against the Bill of Attainder has a special and demanding importance in this case. The "reasons for its inclusion in the Constitution, and the evils it was designed to eliminate", *United States* v. *Brown*, *supra*, at p. 442, are particularly germane to the issues raised in this Petition. As the Court has only recently reminded us, "The best available evidence, the writ-

ings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature" *United States* v. *Brown, supra,* at p. 442.[65]

One of the central ironies of the District Court's opinion is its insistence that its impotence to grant relief in this case flows from the doctrine of separation of powers. But as this Court has only so recently reminded us:

> "The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions * * *,' barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the

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[65] As the Court points out in *United States* v. *Brown, supra,* at p. 441, the "history [of the prohibition against Bills of Attainder] . . . provides some guidelines." A Bill of Attainder was not historically limited to sentences of death, but included "bills of pains and penalties" which were "identical to the bill of attainder, except that it prescribed a penalty short of death, e.g., banishment, *deprivation of the right to vote or exclusion of the designated party's sons from Parliament.*" [emphasis added]

United States v. *Brown,* at pp. 441, 442.

other departments. *The Bill of Attainder Clause was regarded as such a barrier.*" (Emphasis added)

United States v. *Brown*, at pp. 443, 444.[66]

The doctrine of separation of powers therefore, completely contrary to the District Court's assumption, *requires* judicial intervention to strike down the action of the majority of the House as a "legislative act which inflicts punishment without a judicial trial", *Cummings* v. *Missouri, supra.* This is because, as the Chief Justice pointed out in *Brown*:

> ". . . the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."

United States v. *Brown*, at p. 445.

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[66] The Court in *Brown* calls our attention to the famous discussion of Alexander Hamilton explaining the fundamental policy considerations underlying the Bill of Attainder prohibition:

> "Nothing is more common than for a free people, in times of heat and violence, to gratify monetary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent vicitim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."

United States v. *Brown*, at p. 444.

For, as the Court concluded:

> "By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. 'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' *Fletcher* v. *Peck*, 6 Cranch 87, 136, 3 L. Ed. 162."
>
> *United States* v. *Brown*, at p. 446.

Consequently, a bill of attainder generates a special and unique demand on the Court—a compulsion more urgent and imperative even than the striking down of an unconstitutional act. The reason is simple: a bill of attainder represents usurpation, by the legislature, of the functions assigned to the judiciary. The integrity of the judicial function itself is transgressed.[67]

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[67] Within the basic scheme of separation of powers, the Bill of Attainder Clause occupies a special place. Article I, Section 9 has been viewed by commentators as a limitation on the Legislative Branch and an affirmation of the judiciary's sphere of supremacy which is as broad and central to the separation of powers as that created by Article III.

The intensity of the opposition of the Framers of the Constitution to Bills of Attainder has been especially noted by Justice Black:

> "Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man's life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women and children to exile or death without anything that even resembled a trial. Black, 'The Bill of Rights and the Federal Government' in Cahn, *The Great Rights*, 57 (1963)."

(Footnote continued on next page)

The edict of permanent exclusion from membership in Congress during the entire 90th Congress is, as we have seen, universally acknowledged by the entire Congress to

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(Footnote continued from preceding page)

The section of Justice Story's commentary devoted to Article I, Section 9 explains the relationship between the Bill of Attainder prohibition and the separation of powers doctrine.

"§ 1337. The next clause is, 'No bill of attainder' or ex post facto law shall be passed.'

"§ 1338. Bills of attainder, as they are technically called, are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties; for the Supreme Court have said, 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both.' In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching, as well to the absent and the dead, as to the living. Sir Edward Coke, has mentioned it to be among the transcendent powers of parliament, that an act may be passed to attaint a man, after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor. The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes,

have been a "legislative act which inflicts punishment" *Cummings* v. *Missouri, supra.*[68] That it was "without a judicial trial" *Cummings* v. *Missouri, supra,* is not even contested by the respondents. See Point I C, *infra.* As Representative Conyers, a member of the Select Committee pointed out:

> "As a further illustration that Congress is not the proper body to investigate, judge and impose punishment for violations of law, I would point out that our procedures do not include the usual judicial requirements. Our committee combined within itself the functions of prosecutory, judge, and jury. The committee staff made investigations. The committee passed on motions regarding questions of procedure and law. And the committee issued finds relating to the facts of the case."
>
> (90 Cong. Rec., 1st Sess., H. 1928)

The Select Committee which found the "facts" upon which the "legislative punishment" was based justified its denials of the most elemental procedural rights of an accused upon the ruling that "this is not an adversary proceeding" Hearings of Select Committee, *supra,* at p. 59. It needs no citation in this Court to support the threshold

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because the law, in its order course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent excitements; periods, in which all nations are most liable (as well the free, as the enslaved) to forget their duties, and to tramples upon the rights and liberties of others." (III Story, *Commentaries,* 210-11, Chapter 32)

[68] *Cf. United States* v. *Lovett, supra,* at p. 316: "Permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."

proposition of American law that a "judicial trial" requires an adversary hearing. The action of exclusion by the majority of the House, universally conceded by the House itself to be "a legislative act which inflicts punishment", *Cummings* v. *Missouri, supra,* was equally inflicted in a proceeding universally conceded by the House itself to have been "without a judicial trial." *Cummings* v. *Missouri, supra.*

This action of the House, a classic Bill of Attainder, which accumulates "all powers, legislative, executive and judiciary, in the same hands—may justly be pronounced the very definition of tyranny" The Federalist, No. 67, pp. 373-374. As this Court has so recently held, "by banning bills of attainder, the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making" *United States* v. *Brown, supra,* at p. 446.

In *United States* v. *Lovett, supra,* the Court, again facing a challenge to punitive action directed against named individuals, reminded us that "When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *Supra,* at p. 318. Once again, in the words of Mr. Justice Black for the Court in *Lovett,* this Court has no alternative but to say that as "much as we regret to declare" that action of Congress "violates the Constitution, we have no alternative here" *Lovett, supra,* at 318.[69]

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[69] The precise form of the legislative action, bill, Act, or Resolution has no relation to the prohibition against Bills of Attainder. ". . . legislative acts, no matter what their form; that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution", *United States* v. *Lovett, supra,* at p. 315.

C. The punishment of exclusion from Membership in the House inflicted upon the Petitioner violated the due process guarantee of the Fifth Amendment.

The action of the House in excluding the Congressman-Elect on the four stated grounds in H. Res. 278, see Statement of Facts, *supra,* for the avowed purpose of punishing him for these alleged findings of misconduct, see Point I, B, *supra,* was in violation of the due process guarantee of the Fifth Amendment to the Constitution of the United States. It was not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law" *Newberry* v. *United States,* 256 U.S. at 285. It was "an arbitrary edict of exclusion." *Newberry* v. *United States, supra,* at p. 285.

We have demonstrated that this "arbitrary edict of exclusion", designed to punish the named individual, is in sharp violation of the constitutional prohibition against Bills of Attainder. See Point I, B, *supra.* But even if the action is sought to be justified under the powers of the House pursuant to Article I, § 5, this power to "judge" must itself be measured by the commands of the Due Process Clause. This Court has clearly so held.

In the famous concurring opinion of Mr. Justices Pitney, Brandeis and Clarke, in *Newberry* v. *United States, supra,* at p. 285, adopted approvingly by the Court in *United States* v. *Classic,* 313 U.S. 299, this is made amply clear:

> "The power to judge of the elections and qualifications of its members, inhering in each House by virtue of Sect. 5 of Art. I, is an important power, essential to our system to the proper organization of an elective body of representatives. But it is a power to *judge,* to determine upon reasonable consideration of pertinent matters of fact according to

established principles and rules of law; not to pass on arbitrary act of exclusion" at p. 285.[70]

There can be no argument, as we have demonstrated previously, see Point I, B, *supra*, that the act of exclusion was conceived of by the entire House as the imposition of *punishment* upon the Member-Elect.[71] If there is one principle which has "remained relatively immutable in our jurisprudence", *Greene* v. *McElroy*, 360 U.S. 474, 496, it is that punishment may not be meted out to American citizens without an adherence to the minimal protections of due process of law required in an adversary proceeding.

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[70] See, for example, *United States* v. *Ballin*, 144 U.S. 1, "The Constitution empowers each house to determine its own rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result which is sought to be obtained" at p. 5. See, also, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372 (1856): "The article [Due Process Clause of Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

[71] Mr. Celler himself, the Chairman of the Select Committee, characterized the task of the Committee as including the responsibility that "we devise the structure of punishment that will be immediate, effective, certain, and lasting." Cong. Rec. March 1, 1967, H. 1919. He added, "We had to face up to the necessity of meaningful punishment", id. at H. 1920. Mr. Moore, the ranking Republican member of the Committee, said that the Committee has "come to this House with a resolution which involved in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in "the history of our Nation", id. at H. 1921. Those members who rejected the recommendations of the Select Committee, did so because they felt the *punishment* recommended was not severe enough. See, for example, Mr. O'Neal of Georgia: "And let us not be confused by arguments that the punishment suggested by the Committee is sufficient for his wrongdoing", id. at H. 1948. See also, for example, similar statements at H. 1946, H. 1948 and H. 1949.

This is a first concept of our American law and is applicable to any form of governmental action, whether criminal or civil, executive, legislative or administrative, which results in punishing a citizen. See for example, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Shaughnessy* v. *United States ex rel. Meti*, 345 U.S. 206; *Greene* v. *McElroy*, *supra*.[72]

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[72] As Chief Justice Warren has stated in *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959): "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox* v. *United States*, 156 U.S. 237, 242-244, 39 L. ed. 409-411, 15 S. Ct. 337; *Kirby* v. *United States*, 174 U.S. 47, 43 L. ed. 890, 19 S. Ct. 574; *Motes* v. *United States*, 178 U.S. 458, 474, 44 L. ed. 1150, 1156, 20 S. Ct. 993; *Re Oliver*, 333 U.S. 257, 273, 92 L. ed. 682, 694, 68 S. Ct. 499, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g., *Southern R. Co.* v. *Virginia*, 290 U.S. 190, 78 L. ed. 260, 54 S. Ct. 148; *Ohio Bell Tel. Co.* v. *Public Utilities Com.*, 301 U.S. 292, 81 L. ed. 1093, 57 S. Ct. 724; *Morgan* v. *United States*, 304 U.S. 1, 19, 82 L. ed. 1129, 1133, 58 S. Ct. 773, 999; *Carter* v. *Kubler*, 320 U.S. 243, 88 L. ed. 26, 64 S. Ct. 1; *Reilly* v. *Pinkus*, 338 U.S. 269, 94 L. ed. 63, 70 S. Ct. 110,

The extraordinary nature of the proceedings in the House [73] which resulted in findings of fact upon which the House admittedly took *punitive* action against the Member-Elect was that when the Member-Elect moved for certain elementary rights of due process of law at the outset of the hearings of the Select Committee, these were denied. The Member-Elect had requested these rights including, but not limited to, the following:

> "(1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser;
>
> (2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is taken and to participate therein with full rights of cross-examination;
>
> (3) the right to an open and public hearing;
>
> (4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;
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> (5) the right to a transcript of every hearing." [74]

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[73] Until this unusual proceeding the House itself has always afforded a Member due process of law when possible punishment is involved. For example in the First Congress, during the contested election case of *Ramsay* v. *Smith,* 1 Hinds 717, the reports state: "Mr. Smith be permitted to be present from time to time when proofs are taken, to examine the witnesses and to offer counter-proofs—", 1 Hinds 717. See for example Statement of Congressman Robeson in the 47th Congress (1882) in discussing procedures to be followed in an exclusion case: "We are a court, then, of high equity, proceeding according to legal processes to investigate truths, the conditions of which are defined and fixed by constitutional law." *Cf.* also the full procedural guarantees afforded in every respect to the Mississippi Members challenged in the *Mississippi Contested Elections of 1965.*

[74] See motion filed by counsel for petitioner before Select Committee, Hearings of Select Committee, p. 54.

The principal requests of the petitioner for the elementary rights of due process of law required when adjudication will result in punishment, see *Greene* v. *McElroy*, *supra*, were denied by the Committee upon the rather astounding ground that "This is not an adversary hearing." Hearings of Select Committee, *supra*, at p. 59. To make it amply clear why these elementary procedural rights of notice, statement of charges, confrontation and cross-examination were being denied, the Chairman concluded his ruling by stating: "Again the Committee states that this is an inquiry and not an adversary proceeding." Hearings of Select Committee, *supra*, at p. 59.[75]

The truly extraordinary nature of these rulings denying the petitioner the most elementary rights of due process of law, based on the theory that the proceeding which ultimately resulted in punishment was not "adversary" in nature but merely an "inquiry", is underscored by the procedures followed contemporaneously by the other House in the hearings involving Senator Dodd. At the outset of the Dodd hearings the Chairman stated:

> "Senator Dodd will have all his rights protected at this hearing. He may attend the hearings and may testify if he wishes. He may be accompanied by counsel of his own choosing. He or his counsel will be permitted to cross-examine witnesses and offer evidence in his own behalf.
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> "Gentlemen, Rule 13 of our Rules of Procedure limits the right of a person who is the subject of an investigation to submit to the Chairman and

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[75] It should be noted that in its final report Honorable John Conyers, Jr., Member from Michigan and a member of the Select Committee, dissented from this ruling, stating, in part:

> "A. Any Member or Member-elect and his counsel should be afforded the right to cross-examine all witnesses brought before this committee or any other committee inquiring into the qualifications, *punishment*, final right of a Member to be seated, or other related questions." (Emphasis added.)
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> Report of Select Committee, *supra*, at p. 35.

to the Committee questions for cross-examination. That rule is rather narrow and restricted. I said at the time of our adoption of the rules that if any staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure, that is for the right to cross-examine all witnesses. That is what we have arranged for here when this matter was voted, to have a hearing with reference to Senator Dodd. I have been on another committee that had hearings concerning a Senator, the late Joe McCarthy, and we, of course, extended the same rule there. Anything less than that would be less than American standards of justice." [76]

The shocking contrast between the procedural rights granted to Senator Dodd at the hearings which resulted in a recommendation of the mildest form of punishment, censure, and the denial of these rights to this petitioner at hearings which resulted in what the House itself conceived of as the severest form of punishment, exclusion from the House, is best evidenced by the Select Committee of the Senate's own description of the conduct of the Dodd hearings and the rights afforded Senator Dodd and his counsel:

"Rights and Privileges

Subject of hearing

Senator Dodd, as the subject of the Investigation, was afforded the opportunity to attend all hearings and to be accompanied and represented by counsel. *He was given notice of the charges to be investigated and given time to prepare for hearings. He was also given the names of witnesses and a summary of their expected testimony prior to hearings. He and his counsel were permitted to cross-examine*

[76] See report of Hearing of Senate Ethics Committee.

witnesses called by the Committee, and to call and examine additional witnesses and to present additional evidence. The Committee did not call Senator Dodd as a witness, respecting his right to remain silent. He was, however, offered the opportunity to testify and did, in fact, take the stand. At his request, Senator Dodd was examined by Members of the Committee, rather than by Committee counsel. *In addition, Senator Dodd was given opportunity to raise, and be heard on, procedural and jurisdictional questions prior to and during hearings and to object and present argument on the admissibility of evidence."* (Emphasis added.)

Report of the Select Committee on Standards and Conduct of the United States Senate on the Investigation of Senator Thomas J. Dodd of Connecticut. Rep. #193, 90th Congr., 1st Sess., p. 13.[77]

Representative-Elect Powell, facing a hearing which resulted in findings of fact upon which the severest of all punishment was inflicted upon him, in contrast to the Senate Committee's own description of its own proceedings, was (1) given no notice of the charges to be investigated except in such terms as "alleged misconduct on your part occurring at any time since January 3, 1961."[78] (2) he

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[77] In addition the Senate Committee described the rules of evidence it followed in this fashion:

"In general the Committee was guided by the rules of evidence applicable to the Federal courts. All testimony from witnesses was taken under oath and by personal appearance. Hearsay evidence was limited and assigned appropriate probative value. Affidavits in lieu of personal appearance by witnesses were admitted only on restricted matters or where the calling of witnesses was impractical or impossible. All documents and records were properly authenticated before being accepted by the Committee." Report of Senate Select Committee, *supra*, at p. 11.

[78] *Cf.* for example: *Watkins* v. *United States*, 354 U.S. 178 (1957).

was not "given the names of witnesses and a summary of their expected testimony prior to hearings"; (3) Neither he nor his counsel "were permitted to cross-examine witnesses called by the Committee";[79] (4) The Committee did not "respect his right to remain silent" although he did testify freely and voluntarily as to the only relevant matters before the Committee, his constitutional qualifications for membership in the House, but the Committee drew adverse inferences from his exercise of his right to remain silent as to matters relating to possible punishment;[80]

The Committee did not permit counsel for the Congressman-Elect to be "heard" on procedural and jurisdictional questions and to "object and present argument on the admissibility of evidence";[81] and finally, the Committee was in no way "guided by the rules of evidence applicable to the Federal courts", and hearsay evidence rather than "limited" was extensive.

The words of the Honorable Chairman of the Senate Select Committee investigating Senator Dodd are particularly appropriate in evaluating the nature of the proceedings in the House upon which the most serious of punishments was inflicted upon the Congressman-Elect:

> "I said at the time of our adoption of our rules that if any Staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure. . . . Anything

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[79] *Cf.* for example: *Pointer* v. *Texas,* 380 U.S. 400 (1965).

[80] *Cf.* for example: *Slochower* v. *Board of Education,* 350 U.S. 551 (1956).

[81] It hardly needs citation to support the proposition that the right to "effective counsel", see *Powell* v. *Alabama,* 287 U.S. 45, includes the right of counsel to be heard before the Court.

less than that would be less than American standards of justice." [82]

The procedures followed by the House in adjudicating the four findings of fact upon which the punishment of exclusion rested was, in the words of Senator Stennis referred to above, "less than the basic principles of American justice and procedure . . . less than American standards of justice". Cf. *Palko* v. *Connecticut*, 302 U.S. 319; *Gideon* v. *Wainwright*, 372 U.S. 335. Accordingly, the punishment of exclusion ordered by the majority of the House violated the guarantee of due process of law contained in the Fifth Amendment of the Constitution of the United States. It was not an action "based upon reasonable consideration of fact according to established principles of law." *Newberry* v. *United States, supra.*

D. The Exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.

The uncontested circumstances surrounding the refusal of the majority of the House to seat the Petitioner, the duly elected and constitutionally qualified choice of the people of the 18th Congressional District of New York, as their representative reveals a serious question as to whether the Petitioner's rights as a Negro citizen, and the rights of the approximately 400,000 Negro citizens residing in the 18th Congressional District of New York to the freedom and equality guaranteed to them by the Wartime Amendments have been violated.[83]

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[82] See report of Hearing of Senate Ethics Committee.

[83] It is of course unnecessary to demonstrate by affirmative evidence subjective intent of the House that the act of exclusion was related to considerations of race prohibited by the Wartime Amend-

(Footnote continued on next page)

We would respectfully call to the Court's attention the following uncontested circumstances which we suggest lead to the inevitable conclusion that the punitive exclusion of the duly elected and constitutionally qualified representative of the overwhelmingly Negro constituency of the 18th Congressional District of New York was at least in substantial part based upon reasons of race, in violation of the Constitution.

a) In the entire history of the Nation with the exception of a tiny handful of episodes characterized by Chairman Celler as "bespeaking furor instead of fairness" (Congr. Rec. March 1, 1967, H. 1945), in the countless cases brought before the House, Congressman Powell, a Negro citizen, representing a predominantly Negro constituency, was the only Member ever excluded on grounds which, in the opinion of the select Committee of the House, the Majority Leader of the House and the Chairman of its own Judiciary Committee, wholly disregarded the constitutional limits of the House's power.[84]

(Footnote continued from preceding page)

ments. It has long been established that disparity of results or treatment may be sufficient to demonstrate constitutionally impermissible discrimination by reason of race even where the treatment on its face involves no overt racial classifications or stated motivations. See *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Strauder* v. *State of West Virginia*, 100 U.S. 303; *Neal* v. *State of Delaware*, 103 U.S. 370; *Gibson* v. *State of Mississippi*, 162 U.S. 565; *Carter* v. *State of Texas*, 177 U.S. 442; *Rogers* v. *State of Alabama*, 192 U.S. 226; *Martin* v. *State of Texas*, 200 U.S. 316; *Norris* v. *State of Alabama*, 294 U.S. 587; *Hale* v. *Commonwealth of Kentucky*, 303 U.S. 613; *Pierre* v. *State of Louisiana*, 306 U.S. 354; *Smith* v. *State of Texas*, 311 U.S. 128; *Hill* v. *State of Texas*, 316 U.S. 400; *Akins* v. *State of Texas*, 325 U.S. 398; *Patton* v. *State of Mississippi*, 332 U.S. 463; *Cassell* v. *State of Texas*, 339 U.S. 282; *Hernandez* v. *State of Texas*, 347 U.S. 475; *Reece* v. *State of Georgia*, 350 U.S. 85.

[84] See Point I (vi), *supra*.

b) In full recognition that the Congressman-Elect had been overwhelmingly chosen by the predominantly Negro electorate of his district with full knowledge on their part of the alleged acts of misconduct upon which the punishment of exclusion was based, the majority of the House nevertheless further ordered that the Congressman-Elect be permanently barred from the 90th Congress. In face of the universal recognition both within the Congress and in the Nation at large that the citizens of the 18th Congressional District would overwhelmingly return the Petitioner in any new election [85] this action of the House permanently barring the Petitioner from the 90th Congress could only have the objective and result of depriving the predominantly Negro citizens of the 18th Congressional District of the rights guaranteed to them by the Wartime Amendments to an equal participation in the "political community of the United States." Cf. *Civil Rights Cases*, 109 U.S. 3 (1883).

A clearly possible inference which under such circumstances could be drawn by the Negro constituents of the 18th Congressional District was that only a representative acceptable to the all-white majority of the House, who had overridden the sober advice of their own leadership, could be chosen by them. That in fact this was the inference drawn by almost the entire Negro community, not only of the 18th Congressional District, but of the Nation, must give serious pause to this Court.[86]

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[85] See for example:

The World Journal Tribune, editorial: "The Ouster of Powell," March 2, 1967; *New York Post*, "Harlem Vows to Vote Him Back", March 2, 1967; *World Journal Tribune*, "The Nomination is Powell's," and "Shock, Angry Threats in Harlem," March 2, 1967.

[86] See for example an article appearing in the *New York Post* on March 2, 1967, in which Negro leaders expressed their sentiments that the House action denied the people of the 18th Congressional District their basic right to choose their own representatives. "Whitney M. Young, Jr., National Director of the Urban

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Where the singling out of Negro citizens for separate and special treatment occurs, this Court has recognized time and again that this creates and furthers a sense of inferiority in the black man—the original cornerstone of the institution of slavery, see *Dred Scott* v. *Sanford*, 19 How. 393, a sense of inferiority which is at the heart of the badges and indicia of slavery this Nation solemnly promised to eliminate forever in the Wartime Amendments. See *Bell* v. *Maryland*, 378 U.S. 226, concurring opinion of Mr. Justice Douglas at p. 242.

c) The effect of instilling and generating a sense of inferiority in the Negro citizens of the 18th Congressional District, proud of their achievements over the years in having been the first Congressional District composed pre-

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League, called the action against Powell 'shocking' and said that it 'denies the basic right of his constituents to representation of their own choosing. Floyd McKissick, National Director of CORE, said the expulsion of Powell is a 'slap in the face to every black man in this country.' They said the issue 'goes much further and deeper than Adam Clayton Powell the man and the representative. The issue goes to the subject of representative government which black people in Harlem have been denied.'" And in an article appearing in the *Afro-American* of April 29, 1967, Roy Wilkins, Executive Director of the NAACP, said, "Since there was no code which Powell could have violated the sentiment to deny him his chairmanship, to seat him but with a humiliating, unprecedented public and oral censure, and in a final spiteful upset; to expel him from his seat altogether, had to proceed not from a finding rooted in known and commonly applicable rules, but from each Congressman's personal standards, biases and political inclinations. These, of course, are not proper bases for dispensing American justice as derived from Anglo-Saxon precedents. We presume a defendant innocent until a trial has found him guilty. We have laws. We have courts with rules of procedure. We go to extreme lengths to try to prevent personal bias and other irrelevant persuasions from influencing a verdict. Yet, no code of ethics against which a line of conduct might have been measured, the House summarily convicted and punished Powell. At the time one thought Adam's remark about 'lynching' an extreme but understandable reaction."

dominantly of Negro citizens, to have the political ability and organization to elect a Congressman with twenty-two years of seniority,[87] able to wield enormous power in the legislative process[88] was enormously accentuated by the striking disparity in both the procedural treatment and

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[87] See for example:

The following statements which appeared in the *Amsterdam News*, a leading Negro newspaper on March 4, 1967: Isaiah Brown, a constituent of Congressman-Elect Powell stated, "I think Powell should be seated without losing his seniority. That's a foul play if there ever was one. We lose a Congressman or we lose his courage. I can't help but feel that race is involved." Mrs. Ernesta Procope, "It is unfortunate that Adam Powell had to be the scapegoat, and more unfortunate that there was not a code of ethics set forth for everyone in Congress, not only to apply to Adam Powell but everyone as well. As far as I am concerned, he is still the brightest star in the House of Representatives"; Mrs. Mary Eddie, "I believe Adam Clayton Powell should be reinstated to his full position. We cannot afford to lose a Congressman. The Negro needs more representation"; Mike Lopez, "If Powell leaves his position the people who elected him and the Harlem community will be deprived of a great fighter." And in an article in the *New York Times* for January 3, 1967, Rev. Benjamin F. Payton, Executive Director of the Commission on Race and Religion of the National Council of Churches, in announcing the endorsement of Mr. Powell by the Baptist Ministers Conference of Greater New York, said, "We ask the people of the United States not to take away the one great symbol of power that Negroes have developed so painfully over the years."

[88] The significance and importance of seniority in the legislative process in this country is acknowledged by all serious students of our political processes. See for example George B. Golloway, Senior Specialist, Legislative Reference Service of Congress, *The Legislative Process in Congress* (1953), "Legislation is unquestionably much influenced by the men who have scored long and occupy those important places in the House. Seniority or length of service in the House of Representatives is a large factor in giving a member position and influence in the Congress and in Washington." See also George, *The Seniority System in Congress*, 53 Am. Pol. Sc. Rev. 413. "Its significance for constituencies was expressed by Senator Byrd who explained that 'seniority of service and committee rank have importance over and above the capabilities of the members' ". See also Clapp, *The Congressman* (Brookings Institute); Froman, *Congressmen and their Conscience* (1963).

punishment assigned to Congressman-Elect Powell, a Negro citizen, and Senator Dodd, a white citizen. We have discussed in some detail in Point I, B, *supra*, the extraordinary differences in both the procedural protections afforded Congressman Powell and Senator Dodd, and the actual punishments recommended. Disparity in punishment, as this Court has so often pointed out, has been one of the most striking remnants of the slave system. See Mr. Justice Bradley's discussion in the majority opinion in the *Civil Rights Cases* 109 U.S. 3. Even the form of "censure" recommended in Congressman Powell's case, the humiliation of being arrested by the Sergeant-at-Arms and escorted to the well of the House to be publicly rebuked by the Speaker, see Report of Select Committee at p. ——, contrasted to the mild form of rebuke proposed by the Senate for Senator Dodd, accentuates inevitably the "badge of inferiority" which this Nation has pledged itself to eliminate forever from its life. How much more sharply is the inevitable inference of inferiority drawn when the drastic and unconstitutional punishment of exclusion is applied to the one Negro Congressman who has become, whether or not portions of the white community agree, a symbol of effective and powerful Negro participation in the political life of the Nation, while the punishment suggested for the white Senator is of the mildest nature?[89]

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[89] The Negro community cannot avoid making the bitterly obvious comparison between the treatment of Dodd and Powell. See for example the editorial comment which appeared in the Afro-American of April 15, 1967: "For Sen. Dodd, who is white, the punishment is a verbal 'naughty, naughty'. For Mr. Powell, who is not white, a brutal boot out of the door. If this is even-handed justice, we have been reading the wrong books."

Roy Wilkins, Executive Director of the NAACP, made the following statement in the *Afro-American* of April 29, 1967:

"Inevitably, comparison with the unhappy experience of Senator Thomas Dodd, of Connecticut, will be made. Senator Dodd, unlike

This Court in *Brown* v. *Board of Education*, 347 U.S. 483 taught that separate treatment of Negro children instilled in them inevitably a sense of inferiority and frustration. We ask the Court to consider how much more serious is the sense of inferiority and frustration instilled in the Negro citizens of the 18th Congressional District, America's largest black urban ghetto area, as well as in Negro citizens throughout the Nation, when they see what all thinking citizens understand to be the extraordinary disparity between the treatment of the Negro Congressman in the House and the white Senator in the Senate.[90]

Rep. Powell, had notice of nearly a year that he was to be investigated. All during that period and the time of the hearing, the Senator enjoyed his full privileges, retained control of his office and employees, served on his committees and enjoyed all the prerequisites of office. Even now, in the face of such defense as he was able to muster, he goes about his business as a United States senator. Some of the amounts mentioned in the Dodd hearing make the alleged airline ticket errors of the Powell office look like the apple-snatching of a small boy. Misuse of funds, of course, is misuse, whether the amount is $15,000 or $150; the point is that one man went through orderly procedure and the other faced a chopping block."

[90] As we have indicated, we bear no burden here, under the decisions of the Court, to prove subjective racial motivation, underlying the act of exclusion. We feel, however, that it is our responsibility to bring to the attention of this Court the remarks of Mr. Holland, of Pennsylvania, during the March 1st debate, which express at least his opinion that issues of racial discrimination entered openly into the action of the majority of the House in overriding their own Select Committee's recommendation that the Congressman-Elect be seated.

> "MR. HOLLAND, of Pennsylvania: But not even all those who voted to repudiate the committee they had established were guilty of 'racism, pure and simple'. There is little that is pure, and less that is simple about this entire situation.
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> "Neither can I agree with those who have asserted that the question of racism does not enter into the Powell case. We have been told that 'if the gentleman from New York were

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II. The dismissal of the complaint by the District Court for want of jurisdiction of the subject matter totally disregards the most historic opinions of this Court and unless speedily reversed will seriously undermine the constitutional role of the Federal Judiciary as the ultimate guardian of the "very essence of civil liberty." *Marbury* v. *Madison.*

A. The dismissal of the complaint for "want of jurisdiction of the subject matter" is in violation of Article III of the Constitution and the most authoritative decisions of this Court.

Once again, as in *Baker* v. *Carr,* 369 U.S. 186, the District Court's "opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack

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white, he would have been punished long since.' Is ADAM CLAYTON POWELL the only sinner in the House? Does this House have such a long and complex list of precedents of censuring and demoting and fining Members who do not meet its high moral standards? I can thing of a few cases in recent years where Members of this House were guilty of far greater moral and even criminal offenses that the gentleman from New York is even charged with, and yet I cannot remember that the House took action. We left punishment for these offenses to the voters of these Members' districts.

"There is some reason, surely, that the Powell case, alone has given rise to such drastic punishment. I find it impossible to shake the conviction that a large part of the intense public campaign against MR. POWELL stems from the fact of his race. Some of this stems directly from the view entertained in many quarters of this country that the Negro enjoys the rights of full citizenship only on a tentative basis—that if a Negro offends community sensibilities in any way, he and all other Negroes should be made to suffer for it, while white men who commit the same sins are judged by a different, more lenient standard, and their punishment is not visited upon the white community as a whole.

"ADAM POWELL, is being judged, not for his sins alone. He is being punished for the statements of Stokely Carmichael and

of a justiciable cause of action without attempting to distinguish between these grounds." *Baker* v. *Carr*, at p. 196. As in *Baker* v. *Carr*, the District Court below "was

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the bad poetry of Cassius Clay and the sins of every other Negro in the country, just exactly as every law-abiding decent Negro citizen finds the pattern of discrimination against him 'justified' by the argument that some Negroes break the law. This concept of joint responsibility for each other's shortcomings is a handicap that white Americans would have risen up in arms against had it been visited upon every minority group in this country.

"No, Mr. Speaker, I cannot accept the notion that ADAM POWELL is being punished by colorblind justice. I, too, have read the mail that has been cited as 'evidence of deep public concern.' Let me quote some of the mail that I received for the RECORD.

> Shame on you and Congressman ————.
> You are both nigger lovers. We will remember you at the polls next election.

"That postcard was, of course, anonymous. I received, naturally, some letters opposed to Mr. POWELL which avoided using racial slurs, and a few which did not even seem to be motivated by racial ill will. But the mail I have received on this subject left no doubt in my mind that it was largely motivated by the notion that a Negro Congressman ought to be more circumspect, more humble, and more 'grateful' than his white colleagues need to be. I submit, Mr. Speaker, that whatever may be the motives of individual Members in this case, the effort to exclude the gentleman from New York could not have succeeded, and might not even have been attempted, had ADAM C. POWELL done everything he is accused of doing, but had he been—to coin a phrase—'less colorful'. And I think, Mr. Speaker, that we all know that to be true.

"And I believe, too, Mr. Speaker, that there would not have been the intense newspaper and other public pressure—which dates back to the very day MR. POWELL assumed the chairmanship of the Education and Labor Committee—had he not been so vigorous and so successful a fighter for long-needed

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uncertain as to whether our cases withholding judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject-matter for judicial consideration—what we have designated 'non-justiciability.'" *Baker* v. *Carr*, at p. 198. As in *Baker* v. *Carr*, here also "*the distinction between the two grounds is significant*," *supra*, at p. 198 (emphasis added).[91]

As this Court pointed out in *Baker*, "in the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry *necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be molded.* In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, Sect. 2), or

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economic, social, educational and labor legislation. This, too, while select committee's report and while never mentioned in the editorials that demand ADAM CLAYTON POWELL's scalp—this, too, I say, is part of the 'case against' ADAM CLAYTON POWELL.

"And so, Mr. Speaker, I intend to vote against the amendment of the gentleman from Missouri, and, if it passes, against the resolution as amended. I cannot vote to deny the people of the 18th District of New York their representation among us. I suspect that these people, who have borne generations of injustice with an undiminished optimism about democracy that shames their more fortunate fellow citizens, will not learn from this episode to 'elect someone who is willing to shuffle a little'."

90th Congress, Congressional Record, H1950 March 1, 1967.

[91] Respondents below simply refuse to recognize this critical distinction, perhaps sensing the incredible nature of a ruling that this complaint falls for want of federal subject-matter jurisdiction. See Brief for Respondents in District Court.

is not a 'case or controversy' within the meaning of that section; or the cause is not described in the jurisdictional statute'' *Baker,* at p. 198 (emphasis added).

Nothing could be plainer than that the matter in this complaint arises under the Constitution of the United States and that the conclusion of the District Court that the complaint must be dismissed ''for want of jurisdiction over the subject-matter'' [Appendix A to this Petition]. requires immediate reversal.

As this Court reminded the District Court in *Baker,* ''Article III of the Federal Constitution provides that 'The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority. . . .' '' And, as in *Baker,* it is obviously ''clear that the cause is one which 'arises under' the Federal Constitution,'' *supra,* at 199. For, as in *Baker,* ''dismissal of the complaint upon the ground of lack of jurisdiction of the subject-matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit' *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 579, or 'frivolous', *Bell* v. *Hood,* 327 U.S. 678, 683.'' [92] That the claim is insubstantial must be 'very plain'. *Hatt* v. *Keith Vaudeville Exchange,* 262 U.S. 271, 274'' *Baker,* at p. 199.

Here, all parties agree that the constitutional questions raised by the complaint are serious and substantial. The District Court, for example, holds that Petitioner's argument that the constitutional power to judge the ''qualifications'' of its members is limited to those qualifications stated in the Constitution, ''can be argued with force and conviction'' Appendix B, p. 5. The respondents state in

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[92] It is interesting that the Court in *Baker* commented, in Footnote 17 that ''the accuracy of calling even such dismissals 'jurisdictional' was questioned in *Bell* v. *Hood.* See 327 U.S. at 683'', *Baker, supra,* at p. 199.

their memorandum to the Court of Appeals opposing the motion for summary reversal, that "this case presents fundamental constitutional questions", Memorandum, p. 82; that "this case poses questions of transcendent constitutional importance", Memorandum, p. 3; that the constitutional issues "posed on the merits" are "novel and important", Memorandum, p. 3. In short, the respondents conclude in their memorandum to the Court of Appeals that the issues raised in this case are of "fundamental constitutional significance", Memorandum, p. 15. The consequences which flow from the conclusions of both the District Court and the respondents are perfectly clear. As this Court said in *Baker*, "Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter." *Baker*, at p. 199.[93] This direction of the

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[93] The consequences of this clearly erroneous ruling of the District Court for this case "of fundamental constitutional significance", Respondent's memorandum, *supra*, were extremely serious as we shall discuss in the following pages. But at a minimum, a correct understanding of the existence of federal subject-matter jurisdiction would have required at least the granting of the request for the immediate convening of a three-judge court, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (1965, App. D.C.); *Stamler* v. *Willis*, 371 F. 2d 413 (1967 CA 7 rehearing denied *en banc*, Feb. 13, 1967). We discuss this question, *infra*, at Pt. II, C, but at a minimum the understanding that the District Court had *subject matter jurisdiction* and was, in the presence of concededly substantial constitutional issues calling for the enjoining of Congressional action, *required* to convene a statutory three-judge court, would have meant that a prompt hearing on the merits as well as on the issues of "non-justiciability" raised by Respondents, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein* and *Stamler* v. *Willis*, both *supra*, would have already occurred and a direct appeal by either party to this Court under 28 U.S. 2282, permitting the "early resolution of this case" which the Respondents themselves assert they desire, would have been taken, obviating the necessity of Petitioners now calling upon the extraordinary powers of this Court under Rule 20. Memorandum of Respondents, *supra*, at p. 2.

Court in *Baker* merely reflected the admonition of the Great Chief Justice in *Marbury* that "the judicial power of the United States is extended to all cases arising under the constitution." *Marbury* v. *Madison, supra,* at p. 178.[94]

B. The subject-matter of this suit was justiciable and the opinion of the District Court dangerously undermines the historic constitutional role of the Federal Judiciary as the guardian of the civil and political liberties of the people.

The extraordinary confusion in the District Court in holding that the complaint is "dismissed for want of jurisdiction of the subject-matter" resulted in precisely the "significant" consequences prophesied in *Baker.* Since the district court confused "justiciability" with federal subject-matter jurisdiction, it never proceeded to "the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker, supra,* at p. 198.

In the setting of this case this failure of the District Court had the most serious juridical and national consequences. By failing to decide these questions, it could not possibly resolve properly fundamental issues of justiciability, *Baker* v. *Carr, supra;* leaving unresolved questions of "transcendent constitutional importance," Respondents' Memorandum, *supra,* p. 3, the speedy resolution of which is required in the interest not only of the parties here involved, but the Nation itself.

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[94] See *Bell* v. *Hood, supra; Wheeldin* v. *Wheeler,* 373 U.S. 647; *Bock* v. *Perkins,* 139 U.S. 628.

(i) *The claim that the refusal of the majority of the House to seat a duly elected Representative of the people who meets all constitutional qualifications for membership in the House violated the Constitution, is clearly justiciable.*

In the words of Mr. Justice Brennan for the Court in *Baker* v. *Carr,* quoting from *Nixon* v. *Herndon,* 273 U.S. 536, 540, the conclusion of the District Court that this concededly grave contention is non-justiciable "is little more than a play on words." *Baker, supra,* at p. 209. As the Court points out, "of course the mere fact that the suit seeks protection of a political right does not mean that it presents a political question." *Baker,* at p. 209. The Court then proceeded to what is the heart of the analysis of the so-called "political question doctrine":

> "Much confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry. *Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is in itself a delicate exercise in constitutional interpretion, and is a responsibility of this Court as ultimate interpreter of the Consitution,*" at p. 211 (emphasis added).

This is the very essence of the error of the District Court. In order to decide whether "a matter has been in any measure committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed," *Baker, supra,* at p. 211, is "itself a delicate exercise in constitutional interpretation." But this is precisely what the District Court refused to do and what this Court is now called upon to do as the "ultimate interpreter of the Constitution." *Baker, supra,* at p. 211.

The District Court refused to engage in the judicial role it must assume. It declined to meet its responsibility under Article III, the "delicate exercise in constitutional interpretation" which can alone answer the question as to whether this case presents a traditional non-justiciable issue—as to whether the matter is one in "the performance of which entire confidence is placed by our Constitution," *Marbury* v. *Madison, supra,* at 162, in the Legislature.

This is the key to this case. If our analysis of Article One, Clause 2, and Article One, Clause 5 [see Point I, A *supra,* pp. 12 to 17] is correct—if it was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in the House, if the state conventions would have refused to ratify the Constitution had they believed that the Constitution gave to the legislature any power to refuse to seat such an elected representative who met the qualifications set forth in the written Constitution, if indeed the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all constitutional qualifications for membership—then the "matter" here, the question as to who may be the freely chosen representatives of the people to the legislature which governs them, has *not* been confided by the Constitution to the exclusive control of the legislature itself. Quite to the contrary, as we have demonstrated in some depth, this is precisely a matter which has been confided by the Constitution to the ultimate branch of our Government—the people themselves, and the written document they established as their fundamental law. *Marbury* v. *Madison, supra.* As we have fully demonstrated in Point I, A, *supra,* the fundamental premise of representative democracy *requires* that issues deeply involving the free choice of representatives of the people be specifically excluded from the control of the legislature. This is then a classic example of where judicial power *must* be exercised

when "the action of that branch [in this case the legislature] exceeds whatever authority has been committed [to it]" *Baker* v. *Carr, supra,* at 211.[95]

As a matter of fact this Court has already made quite clear its opinion that matters involving the free choice of Representatives to the Federal Congress are in every sense justiciable controversies. This question was discussed in full in *Baker* v. *Carr,* as a building block in what was to the Court a more difficult hurdle: the justiciability of federal interference with the selection of *state* legislators. Thus in supporting its conclusion of justiciability in cases concerning the choice of members of a *state* legislature the Court relied heavily upon its prior conclusions that controversies involving the free choice of Representatives to the Federal Congress involving interpretations of Article One, Clause 2, and Article One, Clause 5 were justiciable. Thus the Court wrote:

> "We have already noted that the District Court's holding that the subject matter of this complaint was non-justiciable relied upon *Colegrove* v. *Green,*

[95] It is extremely interesting while Mr. Justice Harlan dissented from the ultimate conclusion of the Court in *Baker* as to the issue of justiciability, he was emphatically in agreement that justiciability as a concept is wholly interwoven into the definition of the constitutional question involved and that resolution of the so-called "political question" doctrine was impossible without defining and considering the constitutional merits of the question. Thus Mr. Justice Harlan wrote in his *Baker* dissent: *"Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of 'justiciability' or 'political question'* or of any of the other considerations which, in such cases as *Colegrove* v. *Green,* 328 U.S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of Congress", *supra,* at p. 331. (Emphasis added.) Cf. Mr. Justice Harlan's interesting discussion of the inevitable intertwining of the issues of justiciability with the constitutional merits of the case in his dissenting opinion in *Poe* v. *Ullman,* 367 U.S. 497.

supra, and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley* v. *Holm,* 285 U.S. 355, *Koenig* v. *Flynn,* 285 U.S. 375, and *Carroll* v. *Becker,* 285 U.S. 380, *concerned the choice of Representatives in the Federal Congress. Smiley, Koenig and Carroll settled the issue in favor of justiciability of questions of congressional redistricting.* The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley* v. *Holm,* but in two opinions, one for three Justices, 328 U.S., at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564. The argument that congressional redistricting problems presented a 'political question' the resolution of which was confided to Congress might have been rested upon Art. I, § 4, Art. I, § 5, Art. I, § 2, and Amendment XIV, § 2. Mr. Justice Rutledge said: 'But for the ruling in *Smiley* v. *Holm,* 285 U.S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, § 2 [but see Amendment XIV, § 2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Numbers'; and Art. I, § 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. *But, in my judgment, the Smiley case rules squarely to the contrary, save only in the matter of degree.* . . . Assuming that that decision is to stand, I think . . . that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U.S., at 564-565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that 'The shortness of the time remaining [before forthcoming elections] makes

> it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause. 328 U.S., at 565-566." *Baker* v. *Carr, supra,* pp. 232, 233 (emphasis added).

This discussion in Mr. Justice Brennan's opinion for the Court (joined in by the Chief Justice and Mr. Justice Black), relying upon "our decisions in favor of justiciability even in light of these provisions" [Article One, Section 2, 4, and 5], *supra,* at 234, reflects the sharply expressed words singled out by Mr. Justice Douglas [in his concurring opinion in *Baker*]. "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired."[96] *Baker, supra,* at p. 249.

Perhaps the most eloquent expression of the principles underlying the decision of the Court in *Baker* upholding justiciability of the cause then before the Court which compel a similar conclusion here as to justiciability is to be found in the closing words of Mr. Justice Clark's concurring opinion:

> "As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, *a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forbears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.* That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional

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[96] These words, quoted by Mr. Justice Douglas, are from the opinion of Judge McLaughlin in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220, 236, later dismissed as moot, 256 F. 2d 728. *Baker, supra,* at p. 249.

> adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. *National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. Baker, supra,* at 261, 267, (Emphasis added.)

The issue presented in this Petition is, in Mr. Justice Clark's words, "the keystone upon which our government was founded and lacking which no republic can survive." It is that "the form of government must be representative." We believe, with Mr. Justice Clark, that "national respect for the courts is more enhanced through the forthright enforcement of those rights than by rendering them nugatory through the interposition of subterfuges." It is in this sense that firm, decisive and speedy judicial action in vindication of the rights here asserted by the Petitioners would be "in the greatest tradition of this Court."

In *Reynolds* v. *Sims,* 377 U.S. 523 (1964), the Court once again faced the issue of justiciability in terms which are determinative here. The Court reminded the Nation, through the words of the Chief Justice, that:

> "Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. *Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."* *Reynolds* v. *Sims,* 377 U.S. 533 (emphasis added).

The District Court declined to accept this high responsibility on the expressed fear that it would "crash through a political thicket into political quicksand." App.

A, p. 13. The answer of the Chief Justice for the Court in *Reynolds* to this same rationale for refusing to accept the responsibilities thrust upon the national courts by the Constitution remains the most effective response today to the District Court's abdication of its constitutional role:

> "We are cautioned about the dangers of entering into political thickets. . . . Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."
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> *Reynolds, supra,* at p. 566.

The most recent pronouncement of the Court in this area removes whatever question there might ever have been concerning the justiciability of the issues presented in this Petition. The opinion of Mr. Justice Black for the Court in *Wesberry* v. *Sanders* is completely determinative. The matter before the Court in *Wesberry,* as here, charged a violation of Article I, Clause 2. The opinion of the Court sustaining justiciability and rejecting the "political question" doctrine as inapplicable, is wholly instructive here. As the Court held in *Wesberry*:

> "The reasons which led to these conclusions in *Baker* are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:
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> '. . . *Smiley* v. *Holm,* 285 U.S. 355, *Koenig* v. *Flynn,* 285 U.S. 375, and *Carroll* v. *Becker,* 285 U.S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley, Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision.'

> "This statement in *Baker*, which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, § 4, of the Constitution had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen, but *we made it clear in Baker that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in Marbury* v. *Madison, 1 Cranch 137, in 1803.* Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1. *The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of nonjusticiability.' We therefore hold that the District Court erred in dismissing the complaint* (emphasis added) at pp. 6, 7.

The impact of Mr. Justice Black's reasoning in *Wesberry* upon this Petition is clear. Nothing in the Constitution has given to the Congress "exclusive authority" to protect the free choice of Representatives to the Legislature by the people themselves. "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." The extraordinary interpretation of the "political question doctrine" indulged in by the District Court and sanctified by magical invocation of the phrase "separation of powers" would, if sustained, remove "the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury* v. *Madison*". *Wesberry, supra*, at p. 6.

Mr. Justice Black places his finger at the very core of the District Court's opinion. In its effort to avoid "political quicksand" it seeks to overturn over 150 years of American judicial history. The questions which the District Court refused to face have been held to be the solemn duty of American federal courts to resolve, as Mr. Justice Black reminds us, ever since the historic decision in *Marbury* v. *Madison*. It is too late in the life of this Republic for the principles of *Marbury* v. *Madison* to be "easily distinguishable on its facts." Opinion of District Court, App. A, p. 6. In *Marbury* the Chief Justice wrote in words which have guided this Court now for 150 years: "the powers of the legislature are defined and limited; and that these limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison*, *supra*, at p. 175. The District Court appears to believe that where an action violative of fundamental rights of citizens challenged to be beyond the powers assigned by the Constitution to a given branch of government is an action taken by the Legislature, the label "separation of powers" forbids judicial intervention. In the words of Chief Justice Marshall, written in perhaps an even more serious period of challenge and confrontation, "this doctrine would subvert the very foundations of all written constitutions . . . . It would declare that if the legislatures shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure . . . . it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution . . . ." *Marbury* v. *Madison*, *supra*, at p. 178.

We respectfully suggest that a Court which has so recently placed at the very center of its own conception of its role and responsibility to the Nation its power "to protect the constitutional rights of individuals from legislative destruction, a power recognized since our decision in *Marbury* v. *Madison*", *Wesberry, supra,* at p. 6, should forthwith reverse a decision of a district court which so undermines the entire juridical foundation upon which the ever increasing importance of the national courts in the protection of the rights of citizens rests.[97]

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[97] It is of some significance that the Select Committee of the House itself virtually conceded in its formal report that if the House rejected its recommendations and proceeded to exclude the Member-Elect from his seat, such an action would be subject to judicial review. Thus the Select Committee unanimously gave these views on the question of justiciability to the entire House:

"C. THE SCOPE OF JUDICIAL REVIEW:

Pertinent to the issue of judicial reviewability of the action recommended by this Select Committee is recent language of the Supreme Court in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), where the Court enumerated various factors which establish that a case before it involves 'political' (and therefore nonjusticiable) questions:

'Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; * * * or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; * * * or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

See also *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929); *Sevilla* v. *Elizalde*, 112 F. 2d 29, 38 (D.C. Cir. 1940); *Keogh* v. *Horner*, 8 F. Supp. 933 (S.D. Ill. 1934); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965).

In *United States* v. *Johnson*, 337 F. 2d 180 (4th Cir. 1964), aff'd 383 U.S. 169 (1966), where it was held that the Speech or Debate clause precluded a criminal prosecution based on a Member's speech on the floor of the House, the Fourth Circuit stated (p. 190):

(Footnote continued on next page)

(ii) *The remaining constitutional questions are uncontestably justiciable and Respondents do not seriously question the appropriateness of judicial consideration of these contentions.*

No serious contention can be made that the remaining constitutional issues presented in the case are non-justiciable. Both the District Court and the Respondents

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(Footnote continued from preceding page)

"This does not mean that a Member of Congress is immune from sanction or punishment. Nor does it mean that a Member may with impunity violate the law; it means only that the Constitution has clothed the House of which he is a Member with the sole authority to try him. In this respect the Constitution has made the Houses of Congress independent of other departments of the Government. These bodies, the Founders thought, could be trusted to deal fairly with an accused Member and at the same time do so with proper regard for their own integrity and dignity."

Nevertheless, cases may readily be postulated where the action of a House in excluding or expelling a Member may directly impinge upon rights under other provisions of the Constitution. In such cases, the unavailability of judicial review may be less certain. Suppose, for example, that a Member was excluded or expelled because of his religion or race, contrary to the equal protection clause, or for making an unpopular speech protected by the first amendment (cf. *Bond* v. *Floyd*, — U.S. — , 87 S. Ct. 339 (1966)). *The instant case, of course, does not involve such facts. But exclusion of the Member-elect on grounds other than age, citizenship, or inhabitancy could raise an equally serious constitutional issue.* The Supreme Court has stated in *Baker* v. *Carr, supra* (369 U.S. at 211):

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Report of Select Committee, *supra*, at p. 30.

Many Members of the House expressed the same view as the Select Committee that exclusion of a Member for reasons other than lack of constitutional qualifications would subject the action of the House to inevitable judicial review. See, for example, the comments

prefer to handle this dilemma by ignoring the claims. This is understandable since these questions are traditionally the subjects for judicial review.

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of Congressman Moore, the ranking Republican Member of the Select Committee:

> "If Members lay it aside and torture their consciences that we have not done enough to punish the Member-elect from the State of New York, I would only take a moment to say that in their desire to mete out the maximum punishment, if there is anything greater—I do not say this with any sense of levity or trying to be humorous—*if there is any greater punishment and humiliation than that which we have meted out to him, if they desire to approach the problem of expulsion or exclusion, they could very well be on a collision course with courts of this land. Some would care not to have such a circumstance present itself.*
>
> "*But the fact that must visit with us here today is: Do we want to handle the problems of this Member-elect from the 18th Congressional District of New York on the wisest and most permanent course, or do we as Members want to be continually harassed over the next number of years determining whether or not we are right in the procedures* and determination that we make, or whether the courts of the land may have a superior thought?"
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> Cong. Rec., *supra*, H. 1921 [emphasis added].

and the comments of Congressman Burton:

> "In my view, the Supreme Court would have to rule that the gentleman was an inhabitant of the State of New York and duly elected by his constituency to represent them in the House and that the Court would order seating him if this House should ill-advisedly fail to do so."
>
> Cong. Rec., *supra*, H. 1925.

and the comments of Congressman Teague, a Member of the Select Committee:

> "I believe that substantial majority of the American people will support us when we explain to them:
>
> "First. That there are serious problems of constitutional law involved in this whole matter. If we refuse to seat MR. POWELL, this case could well be in the courts for years."
>
> Cong. Rec. *supra.*

(Footnote continued on next page)

(a) A claim that a legislative action violates the Bill of Attainder Clause as a "legislative act which inflicts punishment without a judicial trial", *Cummings* v. *Missouri, supra,* see Point I, *supra,* p. 76, is traditionally a proper subject for judicial review. *Marbury* v. *Madison, supra,* at p. 178, singles out judicial intervention to defend the prohibition against legislative Bills of Attainder as a classic example of a proper judicial inquiry. The precise question was discussed and settled in *United States* v. *Lovett, supra.* The Government urged that the measure there challenged was appended to an appropriations bill and since "Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which the Congress has final say", *United States* v. *Lovett,* at p. 313. The Court, speaking through Mr. Justice Black, flatly rejected this argument pointing out that "were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could not be challenged in any Court. Our Constitution did not contemplate such a result", *United States* v. *Lovett, supra,*

(Footnote continued from preceding page)

The reactions of the Chairman of the House Judiciary Committee, Mr. Celler, and a respondent in this action, as reported in the press directly after the rejection of the Select Committee's recommendation, is interesting:

> "Leaving the House floor after the long debate, Celler said, 'if I were Powell's lawyers, I'd go into court immediately. I think he's got a good case.'"
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> *New York Post,* Thursday, March 2, 1967, p. 53.

See, also, *New York Times,* March 5, 1967:

> "Mr. Celler pointed out that Mr. Powell had met the enumerated qualifications for House membership, and 'it is plain that the Constitution meant to exclude all others.' He added, 'If I was Powell's lawyer, I'd go into Federal court.'"

at p. 314.[98] See, also, *Cummings* v. *Missouri, supra, United States* v. *Brown, supra.*

(b) A claim that the punishment of exclusion from membership in the House violated the Due Process Guarantee of the Fifth Amendment, see Point I C, *supra*, p. 91, is patently justiciable. See *United States* v. *Ballin, supra*: "It [the House] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result sought to be obtained." See, also, *Murray's Lessee* v. *Hoboken Land and Improvement Co., supra*: "The article [Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." The concurring opinion in *Newberry* v. *United States, supra,* adopted approvingly in *United States* v. *Classic, supra,* clearly impels the conclusion that action of the House under color of Article One, Section Five is subject to judicial inquiry where it is not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law", *Newberry* v. *United States, supra,* at 285. The precise issue of justiciability of a claim of violation of due process under a proceeding of the Senate pursuant to its powers under Article One, Clause Two were before the Court in *Barry*

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[98] Mr. Justice Black quotes from Hamilton's famous discussion in Federalist Paper No. 78: ". . . a limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. *Limitations of this kind can be preserved in practise no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*"

v. *United States ex rel. Cunningham,* 279 U.S. 597. The Court carefully stated that proceedings of the Senate pursuant to the powers bestowed upon it by Article I, Clause Five were "subject only to the restraints imposed by or found in the implications of the Constitution", 279 U.S., at 614, and that "judicial interference can be successfully invoked only upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law", 279 U.S. at 620.

(c) A claim that the exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of his district guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments, see Point One, *supra,* pp.99-105, is also a traditional subject of judicial review. In *Bond* v. *Floyd, supra,* this Court pointed out that even the State of Georgia "does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a state legislature excluded a legislator on racial or on other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards." *Bond* v. *Floyd,* at p. 347.[99]

C. This Court has ample power to grant whatever relief is required to remedy the violations of Petitioners' constitutional rights.

(1) The relief requested by Petitioners are the normal judicial remedies traditionally designed to "protect the constitutional rights of individuals for legislative destruction" *Wesberry* v. *Sanders, supra.* They include conventional requests for injunctive and declaratory relief against the

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[99] *Cf.* the position taken by counsel for the Respondent on oral argument before the Court of Appeals in response to a question from the bench that he saw no power of judicial review in the courts even if the House excluded a Member-Elect for racial grounds. See transcript of oral argument.

enforcement of unconstitutional action of a legislature, the resolution permanently barring Mr. Powell from membership in the entire 90th Congress. See *Ex parte Young*, 209 U.S. 123; *Dombrowski* v. *Pfister*, 380 U.S. 479; Cf. *Marbury* v. *Madison*, *supra*.[100]

(2) In addition, Petitioner seeks the issuance of a writ of mandamus directed to the Speaker of the House ordering that officer to swear in the Petitioner as the Representative from the 18th Congressional District of New York. For some reason this request has created the greatest degree of consternation among the Respondents. But this is no novel issue of law. The availability of a writ of mandamus under these circumstances was settled in 1803 in *Marbury* v. *Madison*. In *Marbury*, petitioners sought a writ of mandamus against an exalted officer of the Executive Branch, the Secretary of State. Then, as now, the Respondents urged that in some way, the issuance of such a writ would be to "intrude into . . . the prerogatives . . ." of another Branch. *Marbury* v. *Madison*, *supra*, at p. 168. The answer of Chief Justice Marshall to this fear established principles of law which guide us to this day. In words most appropriate to the present Petition, the Chief Justice wrote:

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[100] The Respondents advanced at one point a rather unusual argument that in some way the Speech or Debate Clause barred any relief whatsoever against Members of the House. It is hardly necessary to discuss this contention, at any rate. The Speech or Debate Clause does not repeal the *institution* of judicial review firmly embedded in our jurisprudence since *Marbury* v. *Madison*. It relates solely to the question of to what degree Members of the House can be held personally liable for wrongs to citizens committed within the scope of their legitimate legislative activities. See *Dombrowski* v. *Eastland*, *cert.* granted, #118 October Term, 1966. The Clause has never been conceived of until the recent extraordinary suggestion of counsel for the Respondents, as a barrier to judicial control over unconstitutional actions of the legislature. Respondents' theory reflects their view of legislative absolutism which pervades their entire argument.

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone, exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?
>
> *Marbury* v. *Madison*, at p. 170.

Resting upon this essential democratic philosophy the Chief Justice concluded with the now famous words which are here determinative:

> "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* at p. 170.

Here, as in *Marbury*, "this, then, is a plain case for a mandamus. The ancient writ required "whenever there is a right to execute an office, perform a service, or exercise a franchise . . . this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy to preserve peace, order and good government." [101] As in *Marbury*, the Petitioner here "has a right in this case to execute an office of public concern, and is kept out of possession of that right." *Marbury, supra*, at 169.

The state courts have consistently followed the principles of *Marbury:* that a writ of mandamus may issue in the circumstances of this case. In *State* v. *Elder*, 47 N.W. 710 (1891):

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[101] The Chief Justice in *Marbury* takes this definition from Lord Mansfield's opinion in *The King* v. *Baker et al.*, 3 Burr. 1267.

> "the relator-plaintiff applied for a writ of mandamus to compel the Speaker of the House of Representatives of Nebraska to open and publish the returns of the general elections of 1890 under Art. 5, Sec. 4 of the State Constitution on the ground that plaintiff met the requirements for eligibility and had received a plurality of the votes for the office."

Rejecting the argument of the defendant Speaker—that as the presiding officer of a co-ordinate branch of the government, the court had no power to issue a mandamus directing him to act—the Supreme Court of the State of Nebraska held that a writ of mandamus would lie. The opinion held that,

> ". . . in considering the public, political aspect of the question presented, . . . [it is necessary to keep in mind], the no less important one of the rights of parties to a redress of grievances against those in high temporary power, as well as those in lower official station. [It is argued] . . . that the officers of each department of that government are responsible directly to the people, and not to the judicial department, for their acts. This doubtless means that an aggrieved party—for example, one who has been elected to an office, the returns of which had been refused to be canvassed and certified by a state board of canvassers—has no right of remedy in the courts, nor other redress than his future opposition to the exercise of arbitrary power as one of the people. This policy, if followed to its conclusion, would tend to make elections uncertain in result, doubly so as to the result declared. . . . But such has never been understood to be the law of this state" (at p. 713).

In his concurring opinion, Judge Maxwell further explained:

> ". . . it is said that the legislature is a coordinate branch of the government, and that it is entitled to construe the constitution and statutes for itself, and therefore is not governed by the construction

placed upon it by the Supreme Court. That it is a very important coordinate branch of the government is true, and the Supreme Court has never, except when its action was invoked in some of the modes pointed out by law, sought to construe statutes or constitutional provisions for the legislature. It is the province of the legislature, however, to pass laws, and of the courts to construe the constitution and the laws. . . . One of the duties imposed upon the Supreme Court is to construe the constitution and the laws of the state . . . and such construction binds every department of the government, including the legislature, and every person within the state. The construction given by the Supreme Court becomes the standard to be applied in all cases.

* * *

"*In a free government, no person is above the law. All are bound by its provisions . . . when a person is elected to the legislature, he, in effect, agrees to perform all the duties enjoined upon him by the constitution and statutes.* . . . In accepting this trust, he accepts it with all its incidents, viz., that, for a failure or neglect to perform the duty required, any of the parties aggrieved may invoke the aid of the courts to enforce performance . . . in case of failure to perform the trust; and it is the duty of the court to enforce the rights of the parties aggrieved" (at pp. 715, 716) (emphasis added).

Judge Maxwell went on to emphasize the fundamental philosophy of government so eloquently put forth in the early days of the republic in *Marbury* v. *Madison* which requires the issuance of the writ here requested:

"It seems to be assumed in the answer that the legislature has the power, and that, therefore, at its option, it may declare whomsoever it pleases of the candidates voted for elected. This is a government of the people, by the people, and for the people. The constitution and laws have provided a mode in which the will of the people shall be ascertained, viz., by a canvass of the votes, and the

> persons whom the people have elected, as shown by such returns, are to be officers for the succeeding two years, unless, for causes which appear behind the returns, they are not entitled to exercise the duties of such offices. . . . Should the procedure set forth in the answer [of respondent speaker] be adopted, the tendency, if not the effect, would be to transfer from the people the election of its own officers, and invest the legislature with that duty" (at p. 717).

Judge Maxwell, again in the spirit of *Marbury* v. *Madison,* completely refutes the contentions of Respondents here—that Respondents are immune to the remedial directions of this Court:

> "[The Constitution] requires the parties elected on the face of the returns to be declared elected and inducted into office. It is said that the Supreme Court has no supervision over other departments of the government. That is conceded. It has not sought to exercise any; nor has it any supervision over the affairs of any educational institution, railway company, bank, partnership, or individual in the state. Nevertheless, if any person aggrieved by any of these parties or others invokes its power, in the manner provided by law, to redress his wrongs, and grant him relief, the courts have authority to entertain jurisdiction, and render a decision confirming his rights, and redressing his wrongs. The law covers the whole state. It applies alike to every individual therein, be he rich or poor, black or white. The remedy is as broad as the law, and the courts apply the remedy. If this were not so, the wealthy corporation or individual might trample upon the rights of the weak and poor, and override the law, and justice be despised and defeated. Every denial of justice, when the relief has been sought in a proper manner, is an act of tyranny, which

tends to the subversion of free government." [102] (at p. 716).

In view of the commitment of this nation to the protection of the "essentials of a democratic society" and the clear violation of that principle by the House action here at issue, ". . . [i]t is emphatically the province and duty of the judicial department . . ." to provide a remedy for the wrongs done. *Marbury* v. *Madison, supra.*

The Great Chief Justice wrote in *Marbury*:

> ". . . it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." Cranch, at p. 163.

It is a first principle of a court of law that the court has power to fashion a remedy for redress of a legal wrong. As Mr. Justice Douglas, concurring in *Baker* v. *Carr, supra,* stated:

> ". . . any relief accorded can be fashioned in light of well known principles of equity."

What is here requested of the Court is wholly within the traditional role of the Court and established juridical

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[102] See also *State ex rel. Donnell* v. *Osburn,* 147 S.W.2d 1065 (1941) (Mandamus issued to the Speaker of the State House of Representatives, the court quoting *State* v. *Elder, Rex* v. *Barker,* and *Marbury* v. *Madison*); *State* v. *Town Council of South Kingston,* 27 A. 559.

Mr. Justice Fortas has recently restated the traditional concepts expressed in *Marbury* and subsequent cases that courts must give protection to citizens "whenever there is a right to execute an office." See his opinion in *Fortson* v. *Morris,* —— U.S. ——, 87 S.Ct. 446,

> "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected." (87 S.C. at 456.)

notions as to the extent of its powers. It is inconceivable to us that the House of Representatives, which justly considers itself among the outstanding assemblies of representative governments in the world, would refuse to accept a mandate which, by the Constitution, this Court (see *Reynolds* v. *Sims, supra*) is empowered, and indeed under its oath of office is required, to hand down.[103]

It would be demeaning to the House of Representatives of this great nation to suggest that it would not adhere to the time-honored words of this Court that "the government of the United States has been emphatically termed a government of laws and not of men." *Marbury* v. *Madison, supra,* at p. 162. Like *Marbury,* this is a "delicate case" (at p. 168). And as in *Marbury,* we are confident that the House is deeply committed, as indeed are all Americans, to the proposition that "it is emphatically the province and duty of the judicial court to say what the law is." *Marbury* at p. 175. This case then calls in question "the very essence of civil liberty [which] consists in the right

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[103] Such a possibility was discussed before a state supreme court in a head-on confrontation with the state legislature in another context in *State* v. *Van Camp,* 54 N.W. 113 (1893). The court there answered:

> "It is also argued against our jurisdiction that the House of Representatives will not be bound by the judgment of the court, and may entirely ignore or defy its authority. . . .
>
> ". . . There are some things which are conclusively presumed, and which no court will permit to be questioned in advance, among which is that a coordinate branch of the government will not resort to revolutionary methods . . . there can be no conflict of jurisdiction between the legislative and judicial departments of the government. . . . The last proposition, however, is subject to one qualification, viz.: *where the court of last resort has placed a construction upon a constitutional or statutory provision, such construction is binding upon all departments of the state government, including the legislature.*" 54 N.W. at 114-115 (emphasis added).

of every individual to claim the protection of the laws, whenever he receives an injury".[104] *Marbury* at p. 163.

(iii) The refusal of the District Court to certify the necessity for a three-judge statutory court was clearly erroneous. The issues raised are conceded by all to be of "fundamental constitutional significance." Respondents' Memorandum, *supra.* The Court of Appeals itself is of the view that "novel issues of substantial public importance" are involved (Appendix D, p. A-16). Federal subject matter jurisdiction was clearly present. See Point II, *supra.* Since the enjoining of congressional action was requested, 28 U.S.C. 2282 required the certification of a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713; *Schneider* v. *Rusk,* 372 U.S. 224; *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (App. D.C.); *Stamler* v. *Willis,* 371 F. 2d 413 (C.A. 7, rehearing denied *en banc,* Feb. 13, 1967).[105]

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[104] The comment of the Chief Justice in *Marbury* is interesting in this respect:

> "In Great Britain the King himself is sued in the respectful form of petition and he never fails to comply with the judgment of his court." *Marbury* at p. 163.

[105] House Res. 278 is an "act of Congress" within the purview of 28 U.S.C. 2282. That a legislative resolution is so characterized has been conclusively held in *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729. This interpretation of an "act of Congress" has also been made in *Stamler* v. *Willis,* 371 F. 2d 415, where the Seventh Circuit, in ordering the convening of a three-judge statutory court, stated that "[T]he complaint alleged generally that the interpretation of section 18 of Rule XI [of the House of Representatives] as expressed by the continued conduct of the subcommittee of the House attributes a meaning to the rule which renders it unconstitutional. . . ." (at 414). See also *Krebs* v. *Ashbrook* (D.C. D.C. Civ. Action No. 2157, 1966).

Moreover, since 2 U.S.C. 25 requires the Speaker, at the first session of Congress after every general election of Representatives, to administer the oath of office "to all the Members present," any

If this statutory duty of the District Court had been met, a prompt hearing on the constitutional issues as well as issues of justiciability raised by the Respondents would have already occurred, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein* and *Stamler* v. *Willis, supra.* Direct appeal to this Court by either party, allowed by the statute, of the "novel issues of substantial public importance" would have permitted the early resolution of these issues, admitted by all as essential to the public interest (see Order of Court of Appeals of May 10, App. D, p. A-16) and the statement of Respondents in their Memorandum to the Court of Appeals. Accordingly, if this Court believes that a three-judge statutory court should have been convened, we respectfully suggest that the Court of Appeals be directed to order the District Court to certify the necessity for such a court, that such a court be forthwith convened, and that this Court direct the statutory district court to issue forthwith the relief prayed for herein.

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interpretation of this statute which would authorize him to withhold such administration to any Member-elect present and possessing the requisite constitutional qualifications as established in Article I, Section 2, Clause 2 would plainly render it unconstitutional as thus applied. Therefore, whether one considers House Res. 278 "an act of Congress" on its own measure or as incorporated into the applicable provisions of 2 U.S.C. 25, its execution, operation or enforcement can only be enjoined by a three-judge district court.

III. The issues presented by the exclusion of Member-elect Adam Clayton Powell, Jr., are of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." [106]

There has never been a case more appropriate and necessary for swift and full resolution by this Court than the instant one.[107] Under any view of the circumstances, the issues here presented fully and completely meet the criteria for petitions for writs of certiorari before judgment in the Court of Appeals so clearly expressed by this Court in *Ex parte Quirin*, 317 U.S. 1.[108] In that case, involving the appeals of eight Nazi saboteurs from denials of writs of habeas corpus by the United States District Court for the District of Columbia, this Court stated:

> "In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court . . ." (at 19)

What could command more "public importance" than danger to the central arch of the Nation—representative

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[106] Rule 20, Revised Rules of this Court.

[107] The Court of Appeals has declared that "novel issues of substantial public importance were tendered which should be resolved at an early date." Appendix D, *infra*.

[108] All parties have conceded that there are "no serious and difficult questions of fact involved." *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330.

government—or so compellingly require resolution "without any avoidable delay"?

A. The action taken by the House of Representatives in excluding Member-elect Powell strikes a critical blow at the very foundations of representative government. See Point I, *supra,* at p. 50. As this Court said in *Reynolds* v. *Sims, supra*:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and *any* restrictions on that right strike at the heart of representative democracy. [emphasis added] (at 535)

The vital significance of this pronouncement cannot be over-stated. It is reflected in the deep conviction of Member-elect Powell's constituents as well as in all Americans —that government without representation is inherently evil and that no citizen should be voiceless in the management of the country's affairs. See Point I, *supra,* at pp. 50 et seq. This was precisely why the American colonies separated from the mother country and established for themselves and their posterity a national community where "taxation without representation", among other tyrannical governmental actions, could not occur. See Point I, p. 18, et seq.

This principle was perhaps best expressed by the *Afro-American,* one of the most widely circulated Negro newspapers, in its editorial of April 29, 1967, when it proclaimed that:

> "He [Member-elect Powell] had been legally elected and the House of Representatives is left with no alternative but to seat him. The House may have the right to punish an erring member, but clearly it does violence to democratic government and to

> the Constitution when it continues to deprive 300,000 residents of a district rightful representation." [109]

The necessity for speedy judicial rectification of this "violence to democratic government" was best expressed in *Roman* v. *Sinrock*, 377 U.S. 695, where this Court, through its Chief Justice, stressed that "delay . . . cannot be allowed to result in an impermissible deprivation of appellee's right to an adequate voice in the election of legislators to represent them."

There is no place where the promises of representative democracy must be more rigidly adhered to than in the sprawling ghettoes of our large urban centers. In Harlem, in Watts, in Hough—in all the well and little-known Negro ghettoes, north and south, east and west, a denial of representation may well result in the beginning of the dry rot that must shortly infect the entire body politic. As Sargent Shriver, Director of the Office of Economic Opportunity, recently put it:

> "But, if you are asking me how, from my experience, my personal experience with the poverty program we need to deal with the problems of the city, my answer would have to be: Why not try democracy.
>
> "Democracy means more than giving every man a vote, because many of the problems we face today

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[109] See also statement by John J. Burns, New York State Democratic Chairman, *N.Y. Times*, Jan. 9, 1967; statement of A. Philip Randolph, *Afro-American*, Jan. 7, 1967 ("An unseating of Powell would be a 'violation of the democratic process.'"; statement of Rev. M. L. King, *N.Y. Times*, Mar. 2, 1967; statements by Rep. Frank Thompson and Rep. Cornelius Gallagher in the *Jersey Journal*, Mar. 2, 1967: Rep. Gallagher: "This is the most ill-advised, uninformed resolution that's been before the House in a long time . . . you cannot exclude forever from the Congress a man who is a resident of his district, a citizen and over 25" and Rep. Thompson who reportedly "pointed to another question—the constitutional right of the people of New York's 18th Congressional District to be represented in the House."

> will never appear on a ballot: welfare regulations; code enforcement; garbage collection, police brutality. Disenfranchisement takes many forms—and all of them render the poor helpless, vulnerable, afraid. Beyond the formal ballot comes the larger mandate of democracy—to give the poor an effective voice in the reshaping of our cities. To give the poor a role, an opportunity to contribute to the rebuilding of our society." [110]

The constituency represented by Member-elect Powell is, to a large measure, that affected by the conditions referred to by Mr. Shriver. Mr. Powell's exclusion is part and parcel of the disfranchisement Mr. Shriver decries and is one of the "many forms" it takes. It is precisely because "[d]emocracy means more than giving every man a vote" [111] that the constitutional crisis set in motion by House Resolution 278 urgently requires immediate settlement by this Court.

B. Member-elect Powell's exclusion is a doubly brutal blow to the overwhelming majority of his constituents who, because they are black men and women, know their century-old alienation from meaningful participation in the democratic process. As Floyd McKissick, National Director of CORE, stated barely two months ago:

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[110] *Federal Role in Urban Affairs*, Aug. 19, 1966, Hearings, Subcommittee on Executive Reorganization of the Committee on Government Operations, U.S. Senate, 89th Congress, 2nd session (1966), at 397.

See similar statements made at the same hearings by Attorney General Nicholas Katzenbach, pp. 256, 269, Mayor of New York John V. Lindsay, pp. 55, 559, and Mayor of Omaha, Nebraska, A.V. Sorenson, p. 1048.

[111] See *Reynolds* v. *Sims*, 377 U.S. 533, *Wesberry* v. *Sanders*, 376 U.S. 1, *Harmon* v. *Forsenius*, 380 U.S. 582, *Baker* v. *Carr*, 369 U.S. 186.

> ". . . the House action proves what we've always stated—that we need to call together a conference of black people to discuss in political terms how we can better protect ourselves and get the benefits of this democracy." [112] (New York Times, March 2, 1967.)

The implications of the frustration and outrage felt in the Negro community are extremely serious and far-reaching if, as reported in the *New York Times* on January 16, 1967, see footnote 112, Negroes are "unconvinced that the democratic process can really change their lives." A. Philip Randolph, Vice-President of the AFL-CIO Executive Council, noted, in an article appearing in the *New York Post*, March 2, 1967, that:

> ". . . the issue [Congressman-elect Powell's exclusion from the 90th Congress] could generate a racial reaction with overtones of violence and disorder and misguided revenge." [113]

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[112] See also statements by Bayard Rustin, Director of the A. Philip Randolph Institute, and Whitney Young, National Director of the Urban League, in the *New York Post*, Mar. 2, 1967. Rev. Donald Harrington, pastor of the Community Church of New York, in an article appearing Feb. 18, 1967, in the *Afro-American*, put the issue sharply when he wrote: "Colored people are feeling more sharply than ever that the black man just doesn't have an equal chance here in this land of the free." On Jan. 16, 1967, the *New York Times* reported: "Yet they [Negro Americans] are haunted by years of experience that has left ghetto Negroes, as one leader put it, 'unconvinced that the democratic process can really change their lives.'" See also the statement by Rev. Walter E. Fauntroy, Dr. Martin Luther King's Washington representative, in the *Afro-American* of Jan. 7, 1967, that "it is 'sheer mockery' for Congress to consider unseating Powell when five Congressmen from Mississippi gained seats last year 'by use of intimidation and the denial of the colored citizen's right to vote.'"

[113] See also statement by Rev. Jefferson P. Rogers, a member of the Committee of 100 in the *Afro-American* of Jan. 7, 1967. Statement by Eugene Callender, Exec. Dir., N. Y. Urban League, N. Y. Times, Apr. 24, 1967.

The impact of the Powell exclusion upon the national Negro community was perhaps best expressed by Rev. William L. England, the Assistant Chaplain of Boston University, in *Mission Witness*, the publication of the Metropolitan Boston Association of the United Church of Christ and the City Missionary Society, Vol. 3, April 1, 1967, No. 2:

"Irrespective of the variety of feeling within it concerning Rep. Powell, the black community understood the attacks upon the Congressman as attacks upon every black man in the country. Every segment of the black community from Whitney Young of the Urban League to Roy Wilkins of the NAACP to Martin Luther King of SCLC to Floyd McKissick of CORE to Stokely Carmichael of SNCC along with the most distinguished leaders of the black religious and business community understood that the issue was not Adam Powell's spending habits nor his public opinions about the way in which the N. Y. Police operate but the blackness of the Harlem legislator.

"Whether it be the case or not, the pious protests of the liberal community for morality among congressmen, even if they be black, has been understood by the black community as little more than a variation of the 'Negroes will be better treated when they learn to bathe regularly, stop having so many illegitimate children, and get off the relief rolls and go to work.'

"Those attacking Powell have gone to great lengths to assert and re-assert that race has not been a factor in their decisions. More than one liberal has pointed his finger at the black community and accused it of 'reverse racism.' However, an analysis of the forces which massed to strip Rep. Powell of his place in Congress raises some question about the purity of the Congressional crusade for internal morality.

"The delegations from the South were unanimous in their judgment that Congress could best represent the na-

tion by the removal of Rep. Powell. This group of legislative moralists contains men whose concerns apparently have never extended to the 14th and 15th Amendments to the Constitution, amendments which theoretically guarantee to every citizen the right to be represented in Congress. In the face of extensive documentation of the systematic exclusion of black people from the polls and the terrorism visited upon those who tried to exercise their franchise, the 89th Congress chose to seat the delegation from Mississippi. This year Congress seemed to expend so much of its moral energy in disciplining Rep. Powell, that it did not have the time to inquire whether the Mississippi delegation had the slightest right to sit in a supposedly representative body. As a token of its esteem, the Democratic caucus elevated William Colmer of Mississippi to the Chairmanship of the powerful House Rules Committee.

"The moral ardor of Congress has yet to reach some of its more auspicious white members. Rep. Joe Pool of the House Un-American Activities Committee exhibited his belief in 'law and order' by announcing last summer that he would defy the Federal Courts if they got in his way. Rep. Wayne Hays, the original leader of the expense-account crackdown, felt it to be in the national interest to have the expertise of the headwaiter in the House dining room on a fact-finding trip to Europe. Former Rep. Thomas J. Lane of Massachusetts was convicted in 1956 of evading $38,542 in income taxes. He was sentenced to 4 months in jail and fined $10,000. Yet he was graciously received in the halls of Congress and his seniority was unchallenged.

"Obviously the citizens of Harlem should be the sole arbitrators of their representative to Congress. In the election of last Fall they had an opportunity to judge whether Rep. Powell met their standards, and whether the rest of the nation likes it or not, they chose Adam Clayton Powell to be their representative. As the American Civil

Liberties Union has pointed out, the only conditions Congress can legally consider with respect to Rep. Powell's eligibility to be seated, once duly elected, are age, citizenship, and residence. In each case Rep. Powell meets the requirement.

"It should also be recognized that the action against Rep. Powell may well signal the first victory of a revitalized Dixiecrat-Conservative alliance in Congress. The tuning up of this alliance indicates rough sledding, not only for black people, but for the working man and his family, the student and education in general, the urban and rural poor of all races, and in a very real sense all those concerned about civil liberties and peaceful alternatives in international problems.

"The Dixiecrat-Conservative alliance is firmly enthroned in the chairmanships of the House Committees. Of the 20 standing committees of the House, 14 have Southerners as chairmen, a situation produced by the seniority system which seems to work well for Southerners, but apparently does not offer much protection for the likes of Rep. Powell. The voting record of these Southern chairmen doesn't provide much ground for optimism about passage of pressing social legislation.

"Under the leadership of Adam Clayton Powell, the Committee on Education and Labor produced an unprecedented volume of social legislation, a fact publicly acknowledged by both President Johnson and Speaker of the House, John McCormack. The Committee was responsible for enactment of the Manpower Development and Training Act, the Anti-Poverty Bill, the Juvenile Delinquency Act, the Vocational Education Act, and the National Defense Education Act. Rep. Powell's so-called 'stalling' usually had the effect of pressuring Congress and the Administration into making sure that legislation passed which covered all Americans.

"The scrapping of the 'Great Society' in favor of an escalated war in Vietnam will certainly move more smoothly with a chairman of the Education and Labor Committee other than Adam Clayton Powell. The attempts, such as that of Rep. Powell to substitute an $8 billion anti-poverty bill for the $1.75 billion bill favored by the Administration, will likely be infrequent from the new chairman of the Committee, Rep. Carl Perkins of Kentucky.

"The majority of whites in this country are likely satisfied with the treatment meted out to Rep. Powell. However, the expulsion may be only the harbinger of a future America in which hostility, violence, and oppression continue to be the characteristics of the relations between races. The difference between the present and the future may lie in the possibility that in the future the spark of humane concern, which is at least verbalized in the 'American creed' at present, will be dead. Paul Jacobs of the Center for the Study of Democratic Institutions recently suggested such a possibility when he said, '. . . I would say that in certain ways America is now in the initial stages of a movement toward the kind of society that has its fullest flower at the moment in South Africa.' "

C. With the democratic process in grave jeopardy and the psychological destruction of the Negro citizens of this country significantly threatened by the action of the majority of the House of Representatives overriding its own leadership this Court represents the only voice which respondents will heed. The role of the Court was thus delineated in its earliest days in the words of Chief Justice Marshall:

"The government of the United States has been emphatically termed a government of laws, and not of men.[114]

* * *

It is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. *Madison*, 1 Cranch, at 163, 177.

That this Court would ultimately be called upon to decide the constitutionality of the House action[115] was suggested by Representative Emanuel Celler, Chairman of the Select Committee created pursuant to House Resolution 1, immediately after the exclusion vote was taken.

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[114] Roy Wilkins, Executive Director of the NAACP, stated in an article appearing in the *Afro-American* of Apr. 29, 1967:

"Since there was no code which Powell could have violated, the sentiment to deny him his chairmanship, to seat him but with a humiliating, unprecedented public and oral censure, and, in a final spiteful upset, to expel him from his seat altogether, had to proceed not from a finding rooted in known and commonly applicable rules, but from each congressman's personal standards, biases and political inclinations.

"These, of course, are not proper bases for dispensing American justice as derived from Anglo-Saxon precedents. We presume a defendant innocent until a trial has found him guilty. We have laws. We have courts with rules of procedure. We go to extreme lengths to try to prevent personal bias and other irrelevant persuasions from influencing a verdict.

"Yet, with no code of ethics against which a line of conduct might have been measured, the House summarily convicted and punished Powell."

[115] In an editorial appearing in the *New York Times* on February 26, 1967, the editors stated:

"If Mr. Powell were excluded, or expelled, Congress might well find itself at odds with the courts in view of the Supreme Court's decision last December which found that the Georgia Legislature, in denying Julian Bond his seat because of his anti-war views, was denying him his constitutional rights. The Legislature has since seated him."

See Point I, *supra*, pp. 43-49.

"Mr. Celler pointed out that Mr. Powell had met the enumerated qualifications for House membership, and 'it is plain that the Constitution meant to exclude all others.' He added, 'If I was Powell's lawyer, I'd go into Federal court.'"

New York Times, March 5, 1967.

A further elaboration as to the responsibility of this Court appeared in the editorial column of the *World Journal Tribune* of April 13, 1967:

"Each of the three branches of government has considerable independence and authority, to be sure, but none is an island. They are part of a system of checks and balances—a safeguard against excesses by any branch.

"This is precisely the machinery set in motion by Powell's lawsuit. It contends he met the only constitutional requirements—age, citizenship and residency—for admission. Powell insists that in excluding him on other grounds, the House exceeded its constitutional powers.

* * *

"Congress is not immune to constitutional challenge and reversal on the laws it passes. Neither is it, or should it be, immune on the internal use or misuse of its powers on individuals duly elected, like it or not, by their constituents."[116]

Not only is the Court the sole institution possessing power to review and rule upon the legality of the House action, but it is also the institution upon which the *duty* "to preserve unimpaired the constitutional safeguards of civil liberty," *Ex parte Quirin, supra,* rests. The editorial appearing in the *New York Times* on Sunday, March 5, 1967, correctly noted that ". . . while the House in the past —between 1870 and 1921—has excluded three members-elect on grounds other than the three qualifications stipulated in the Constitution, its power to do so has never been tested in the courts."

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[116] See also the editorials appearing in the *Jersey Journal,* Thursday, Mar. 2, 1967, and in the *World Journal Tribune,* Feb. 4, 1967.

The fact that this issue "has never been tested in the courts" was explained by Chief Judge Tuttle in his dissenting opinion in *Bond* v. *Floyd*:

> "It can be readily understood why there are few legal precedents to give guidance in such a situation. . . . It is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contests in court." (at 346).

This Court is urgently called upon to act so that the issues here presented, issues concededly of the highest constitutional magnitude, are settled by an authoritative pronouncement rather than by attrition. The congressional action in excess of the legislative power will continue to go untested unless this Court, as the only forum with authority to reverse the disfranchisement of the over 300,000 voters of the 18th Congressional District, acts speedily in this case.[117]

This is precisely why Chief Justice Warren in *Harmon* v. *Forsennius*, 380 U.S. 528, underscored the "importance and immediacy of the problem" where the right to vote for candidates of one's own choice is concerned. As he stated:

> "As this Court has stressed on numerous occasions, 'the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,' Reynolds v. Sims, 377 U.S. 533, 535. The right is fundamental 'because preservative of all rights.'" *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370." (at 537)

In protecting this right with the "immediacy" urged by the Chief Justice, this Court not only protects its own dignity

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[117] The failure of this Court to grant the writ prayed for will almost certainly exhaust the life of the 90th Congress and thus make moot, insofar as Member-elect Powell's constituents are concerned, their "contest in court" for a legislator of their own choosing.

but, logically and directly, that of the Congress and that of the American electorate.

D. The effects of the unconstitutional resolution of exclusion reach far beyond the immediate range of Congressman-elect Powell's constituents and even beyond the American system of representative democracy. This country represents itself, in the community of nations, as a "nation of laws, not of men," *Marbury* v. *Madison, supra.* However, the House action here belies that representation. An *Afro-American* editorial appearing January 7, 1967, stated:

> "If Mr. Powell is denied his rightful seat in Congress, if he is stripped of his chairmanship of the House Educational and Labor Committee; if attempts are made to prosecute him for doing what other members have done with complete impunity, we and the world will know Congress does have a double standard of justice—a more lenient rule if you're white, a sterner and more rigid rule if you happen to be black."

The following appeared in the editorial column of the *Jersey Journal* of March 2, 1967:

> "The majority of the House of Representatives has made a blunder for which the whole country will have to pay; it lowers respect everywhere for our government. To call it 'idiotic' is to be mild."

E. This Court is called upon to recognize the seriousness and grave importance to the people of the 18th Congressional District of having, this term of Congress, a representative with full dignity and seniority in the House. As the Reverend Benjamin F. Payton, Executive Director of the Commission on Race and Religion of the National Council of Churches, stated:

> "We ask the people of the United States not to take away the one great symbol of power that

Negroes have developed so painfully over the years."[118]

New York Times, January 3, 1967.

Unquestionably, Congressman-elect Powell's "record" in the House has been extraordinary.[119]

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[118] Congressman-elect Powell's constituents bitterly denounced the House's arbitrary action which in a stroke denied them not only their basic right to a voice in the Congress but a right to be represented by this powerful, senior member of that body. See Point I, D, *supra*, p. 103. See also article appearing in the *New York Times* of Jan. 13, 1967, and the *World Journal Tribune* of Mar. 2, 1967.

[119] In a letter to Congressman Powell of March 18, 1966, released to the press on March 24, 1966, President Johnson wrote:

"The fifth anniversary of your Chairmanship of the House Education and Labor Committee reflects a brilliant record of accomplishment. It represents the successful reporting to the Congress of 49 pieces of bedrock legislation. And the passage of every one of these bills attests to your ability to get things done.

* * *

"Only with progressive leadership could so much have been accomplished by one Committee in so short a time. I speak for the millions of Americans who benefit from these laws when I say that I am truly grateful."

See also the editorial comment appearing in the *Afro-American* of Jan. 7, 1967:

"Mr. Powell is guilty of using his tremendous power as chairman, to guide the House Education and Labor Committee into writing the greatest record of progressive legislation in Congressional history.

"For that he incurred the bitter enmity of all opponents of federal aid to education and higher minimum wages. They have never forgiven him.

"Mr. Powell is also guilty of originating the idea that federal money should never be used to underwrite segregation.

"That idea, written into law as Title 6 of the 1964 Civil Rights Bill, if honestly enforced, could doom forever racial inequities in schools, hospitals, recreation and indeed, all programs and agencies which dip their fingers in the U.S. Treasury for support.

"It has become the solid rock against which the segregationists have been beating their fists ever since it was enacted into law."

It is also unquestionably true that much of the successful "bedrock legislation" shepherded through the House by Congressman Powell now faces imminent destruction. A report in 25 *Congressional Quarterly,* Number 1, January 6, 1967, at page 2, stated: "In a December 27 letter to all Senate Committee chairmen, Majority Leader Mansfield asked for a major re-examination of 'Great Society' and older programs. New social welfare programs will face heavy going during consideration of appropriations requests, particularly controversial programs such as rent supplements, the Teachers Corps, the anti-poverty program, demonstration cities, and various educational aid plans." See also 25 *Congressional Quarterly,* Number 18, May 5, 1967, p. 727; *New York Times* article by Neil Sheehan, January 16, 1967. For this reason in addition, the right of Congressman Powell to his seat should be promptly and definitively adjudicated.

F. One of the most compelling reasons why the extraordinary power of this Court must be exercised in granting this Petition for Writ of Certiorari prior to judgment in the Court of Appeals, and in hearing argument this Term, is that every day the people of the 18th Congressional District of New York are deprived of their chosen representative who has been denied the right by a resolution of Congress to sit at any time in the 90th Congress, they suffer the most extreme, immediate, and irreparable loss any citizen of this Nation can ever face—far more serious than the loss of the monetary profits or the bargaining rights of the steel companies in *Youngstown Steel,* 343 U.S. 579—namely, their right to participate in our representative democracy. Unless this Petition is granted, there is no possibility of a final adjudication of the right of a Representative who is the overwhelming choice of the people of his district and who is fully qualified by the Constitution to voice *their* views and cast *their* votes in matters which vitally concern them as citizens of the district and the Nation. The speediest processes suggested by the Court of Appeals could not result in a final adjudication of this question by this Court in this Term of Court. Conse-

quently, the 18th Congressional District will remain unrepresented by the Representative of its choice throughout this entire session of Congress. Only the granting of this Petition would permit this result, so critical not only to the citizens of the 18th Congressional District of New York, but to the prestige and dignity of this Nation.

It is unthinkable that this Court would assent to a situation in which a conclusion could inevitably be drawn that our system of law can permit the disfranchisement, for an entire session of the Congress, of over 400,000 predominantly Negro citizens. Rule 20 of this Court is designed to meet precisely this solution.

Conclusion

Present distinguished chief counsel for respondents served as an attorney for Bethlehem Steel Company in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 when that corporation, along with other steel companies, petitioned this Court some sixteen years ago for a writ of certiorari pending judgment in the Court of Appeals. In that petition, Judge Bromley and his colleagues [120] emphasized that "the issues are of such vital importance to the Nation that the public interest requires that this Court authoritatively confirm the judgment of the District Court." (at 6)

The reasons advanced for the granting of that petition could not be more applicable here. Among others, they were as follows:

> "It is inescapable that the public interest requires the prompt settlement by this Court of the grave constitutional questions involved in this case. It is for this reason primarily that petitioners seek review by this Court of the judgment below in their favor, before rendition of judgment by the Court of Appeals. . . . [T]he empty formality of proceeding to final hearing could have no effect on the basic posture of the constitutional questions presented and

[120] Who included John W. Davis, Charles Tuttle and Theodore Kiendl.

> would decidedly not serve the public interest. . . . [A]n early determination of the ultimate question presented in this case is of vital interest to all concerned. . . . [T]his dangerous and irreparable interference—which can never be undone—can only be resolved by decision of this Court of the vital constitutional questions here presented." (at 7-8)

In their brief submitted in opposition to a stay requested by the government in its petition, counsel for the steel companies emphasized the compelling nature of their clients' needs in words that might have been written for this case.

> "From every point of view, it is submitted, what is most required by the public interest and by the spirit of our tripartite constitutional system is that this Court, the ultimate and final judicial authority, should settle the rights and obligations of the parties to this great controversy at the earliest time consistent with the deliberations necessary for wise determination of an issue fundamental to the structure of our government. Otherwise the most serious injury will be suffered not only by the respondents but by all parties concerned in this controversy." (at 3)

In that case, the steel companies were seeking to void what they claimed was the government's unconstitutional seizure of their property growing out of a labor dispute. Here, petitioners wish to void what they claim is an unconstitutional exclusion of Member-elect Powell and the disfranchisement of the 18th Congressional District. If "the right to vote freely for the candidate of one's choice is the essence of a democratic society," *Reynolds* v. *Sims*, *supra*, it certainly ranks in importance with that of the steel companies to possession of their rolling mills and open hearths.[121]

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[121] Or, with the enforcement of gold clause contracts (*Norman* v. *B&O R. Co.*, 294 U.S. 240); or the validity of statutes requiring contributions by carriers to finance compulsory retirement plans (*Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330); or the fixing of coal prices (*Carter* v. *Carter Coal*, 298 U.S. 238).

In the last analysis, the fundamental question is a rhetorical one. Is the right of the 400,000 black citizens of the 18th Congressional District to elect a representative of their own choice to the Congress of the United States an issue less "fundamental to the structure of our government;" cf. petition for writ of certiorari prior to judgment filed by the present counsel for Respondents in *Youngstown*, than the rights of the nation's private steel companies to resist the seizure of their plants by the executive order of the President? We respectfully suggest that there can only be one answer to that question.

The petition for writ of certiorari prior to judgment in the Court of Appeals should be granted. Petitioners respectfully move the Court that respondents be requested to reply promptly to this petition and that after a short period of time for reply briefs oral argument be set down in this Term of Court.

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